LSA
LEGISLATIVE SERVICES AGENCY
Serving the Iowa Legislature

LEGISLATIVE GUIDE

Legal Services Division

Note to Reader:

Legislative Guides, prepared in an objective and nonpartisan manner, provide a general survey of a particular area of the law and are intended for use primarily by members of the Iowa General Assembly and their staffs. Legislative Guides are updated periodically to reflect changes in the law. The reader is cautioned against using information contained in a Legislative Guide to draw conclusions as to the legality of a particular behavior or set of circumstances.

About the Author:

Joe Royce is a Senior Legal Counsel with the Legal Services Division, Legislative Services Agency. Mr. Royce has served as Legal Counsel for the Administrative Rules Review Committee, a statutory committee of the General Assembly, since 1976. Mr. Royce also drafts legislation, primarily in the areas of state government and campaign finance.

This guide was edited by LSA Legal Counsels, Michael Duster and Jack Ewing.

Portions of this guide relating to oversight of the administrative rulemaking process were written by Matthew Bishop, 2011 Drake University Law School Law Intern.

Mr. Royce can be reached by phone at (515)281-3084 or by e-mail at:

joe.royce@legis.state.ia.us

Iowa Legislative Services Agency
State Capitol
Des Moines, IA 50319

December 2011

RULEMAKING GUIDE

Table of Contents

Appendices

I. Introduction and Overview of State Government Rulemaking

Unless otherwise indicated, references in this Legislative Guide to the Iowa Code incorporate both the 2011 Iowa Code and 2011 Iowa Code Supplement. References to the Iowa Administrative Code are current through November 2010.

Iowa state government consists of over 100 rulemaking entities with a variety of titles: departments, divisions, boards, and commissions. See Appendix A for a complete list of such entities.

In 2010, 52 agencies adopted 427 filings. The 2010 filings are detailed by agency and by month in Appendix A. As always, the Department of Human Services leads the list with 88 filings (68 filings in 2009). Twenty-two of these 52 agencies adopted only one or two filings.

Rulemaking filings generally contain more than a single rule change. The 427 filings actually represent over 2,000 individual rule additions, amendments, or repeals. Rulemaking activity for the last 10 years is as follows:

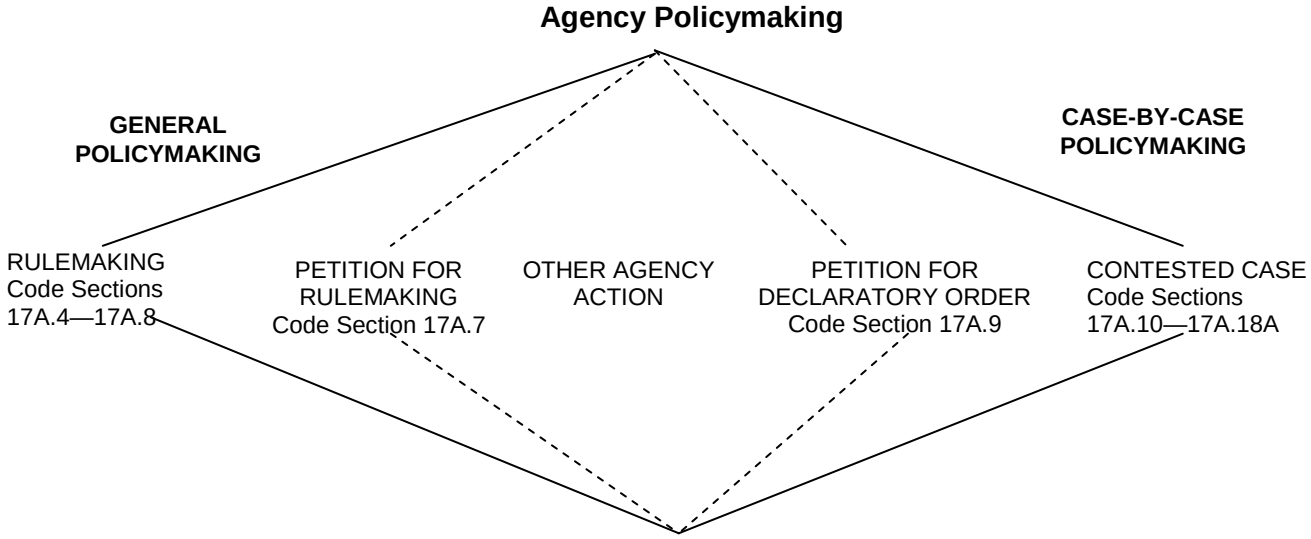
Iowa Rulemaking Filings — Calendar Years 2000 — 2009

YEAR	AGENCIES	FILINGS		YEAR	AGENCIES	FILINGS
2010	52	427		2005	54	396
2009	56	473		2004	56	420
2008	52	468		2003	54	435
2007	51	446		2002	59	523
2006	58	440		2001	64	419

II. A Sketch of the Iowa Administrative Procedure Act (IAPA)

A. Overview of Iowa Code Chapter 17A

Iowa Code chapter 17A, referred to as the Iowa Administrative Procedure Act (IAPA), has a variety of procedures and requirements that impact how a state agency creates policy, as summarized in the following diagram:



B. Background of the Rulemaking Process

The current Iowa rulemaking process went into effect in 1975[1], and is based on the 1946 federal Administrative Procedure Act[2] and the 1961 Model State Administrative Procedure Act. The IAPA was carefully crafted during 1973 and 1974 by a special subcommittee of the General Assembly.[3] Arthur Earl Bonfield, a professor at the University of Iowa College of Law, served as special counsel to the subcommittee. Professor Bonfield's subsequent law review article remains the first and best resource for information concerning Iowa's rulemaking process.[4]

The rulemaking process serves four basic functions:

- It requires agencies to publish a notice detailing their intention to adopt a new rule or revise an existing one.
- It provides an opportunity for the public to offer comments and criticisms on that proposal.
- It provides a limited opportunity for both the Governor and the General Assembly to exercise oversight over the rulemaking process.
- It provides a publication process to widely distribute final rules.

This process does not give the public veto power over agency rulemaking; agencies have the authority to use their expertise to implement the type of rule they think most effective. To be lawful, a rule must be within the statutory authority of the agency, it must

[1] For a skeletal outline of the rulemaking process, see appendix "B".
[2] 5 U.S.C. §§ 551-559.
[3] Uniform State Administrative Procedures Act Subcommittee of the Standing Committee on State Government.
[4] Arthur E. Bonfield, The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, The Rulemaking Process, 60 Iowa L. Rev. 731 (1975).

be adopted using the required rulemaking process, and it must be reasonable. Although the rulemaking process does not dictate what policy an agency will implement, it does insure that agency decision making is subject to public scrutiny and that agencies give full and fair consideration to public comments.

The IAPA is a procedural code. The rulemaking process does not control the substance of state agency rulemaking; each agency's individual enabling legislation dictates the substance of the rules. The rulemaking process relates to how an agency creates its policy, not what that policy will ultimately be when the process is complete. The rulemaking portion of the IAPA is set out in Code sections 17A.4 through 17A.8. Code section 17A.19 sets out a process for seeking judicial review of virtually all agencies' actions, including rulemaking. Code section 17A.19 also details the grounds that courts may use to overturn an agency rule.

The rulemaking process is to be construed broadly to effectuate its purposes. This means that exemptions or exclusions from the rulemaking process are to be construed narrowly.[5] Code section 17A.23 specifically provides that any statute attempting to lessen or eliminate the requirements of the IAPA must refer specifically to the IAPA; otherwise the action will not be effective.[6] Code section 17A.1(2) states in part that:

> ". . . . nothing in this chapter is meant to abrogate in whole or in part any statute prescribing procedural duties for an agency which are greater than or in addition to those provided here."

As a practical matter, this commonly means that when a statute requires or authorizes an agency to make "rules," Code section 17A.1(2) requires that the rulemaking process be followed, even if that rule might otherwise be excluded or exempted from the rulemaking process.[7]

C. Agency Policymaking: General Policy and Individual Decision Making

State agencies create policy in a variety of ways; however, most fall into two basic categories. General policymaking applies to broad groups or classes, while the second category, case-by-case policymaking, applies to a specific individual or entity, based on a specific fact situation.

The primary example of general policymaking is the administrative rule, which is governed by a process set out in Code sections 17A.4 through 17A.8. A rule is analogous to a statute enacted by the General Assembly. The rulemaking process is to a great extent a political process, providing a forum for the stakeholders in agency decision making to voice either their support or opposition to an agency proposal. Refer to page 10 for a detailed discussion of the definition of rule.

The primary example of case-by-case policymaking is the contested case proceeding. A contested case proceeding is analogous to a judicial proceeding, where an evidentiary hearing is utilized to determine individual rights, duties, and responsibilities based on a

[5] Schmitt v. Iowa Department of Social Services, 263 N.W.2d 739, 745 (Iowa 1978) (citing Iowa Code § 17A.23).
[6] Kerr v. Iowa Public Service Co., 274 N.W.2d 283, 287 (Iowa 1979).
[7] See, e.g., Iowa Code § 8A.413 (requiring the Department of Administrative Services to promulgate rules concerning state human resource management). The provisions of Iowa Code § 8A.413 would otherwise be exempt from rulemaking, under § 17A.2(1)(c) as an interagency or intraagency manual.

specific fact situation. Unlike a rulemaking decision, the agency decision in a contested case must be supported by evidence contained in the record made before the agency. A decision in a contested case binds only those persons who were actual parties to that decision. However, that decision may serve as a precedent that can be applied in future decisions involving the same or a very similar fact situation.

Between these two extremes is a myriad of agency activities lumped together as "other agency action." The IAPA includes procedures for handling petitions for rulemaking,[8] declaratory orders,[9] and requests for waiver.[10] Other agency action can be challenged using the procedures for judicial review established in Code section 17A.19.[11]

D. Agency Policymaking: Rulemaking vs. Case-by-Case

Except as provided in Code section 17A.3(1)(c), the rulemaking process does not mandate that an agency develop its policy through rulemaking. An agency's own enabling statute determines whether rules are required. As a general rule, absent a statutory mandate for rulemaking, an agency can create its policy either through rulemaking, or on a case-by-case basis based on individual facts and circumstances.[12] The rulemaking process does not set the scope of agency rulemaking responsibilities. The substantive rulemaking obligations of an agency are set out in the enabling statute.

Code section 17A.3(2) provides that any "agency rule or other statement of law or policy, or interpretation, order, decision, or opinion" that may be established cannot be used by the agency unless indexed."

Code section 17A.3(1)(c) imposes a special rulemaking requirement that is both substantive and substantial. It states:

> As soon as feasible and to the extent practicable, adopt rules, in addition to those otherwise required by this chapter, embodying appropriate standards, principles, and procedural safeguards that the agency will apply to the law it administers.

The meaning and impact of this provision has been fully detailed by Professor Arthur Bonfield.[13] It does not eliminate case-by-case decision making — it simply requires that a structure be set out in rule to guide and channel that decision making. It would be impossible to craft a rule so detailed and complete that individual interpretations were unnecessary. Moreover, in some situations the program or statutory scheme may require

[8] Iowa Code § 17A.7.
[9] Iowa Code § 17A.9.
[10] Iowa Code § 17A.9A.
[11] Iowa Code § 17A.19(1) provides in part: "A person or party who has exhausted all adequate administrative remedies and who is aggrieved or adversely affected by any final agency action is entitled to judicial review thereof under this chapter."
[12] Young Plumbing and Heating Co. v. Iowa Natural Resources Council, 276 N.W.2d 377, 382 (Iowa 1979).
[13] Arthur E. Bonfield, Amendments to Iowa Administrative Procedure Act, Report on Selected Provisions to the Iowa State Bar Association and Iowa State Government, pp. 15-22 (1998). Professor Bonfield writes: "[A]gencies must make a real and substantial effort to provide, by *rule*, procedural protections that are adequate, under the particular circumstances, to protect persons affected by agency action against improper exercises of agency power. It also requires agencies to make a real and substantial effort to elaborate, by *rule*, the substantive standards used in the application of the laws they administer in order to provide fair notice of their contents and some assurance that they will be consistently applied." Id. at 18 (emphasis in original).

extensive and individualized decision making that precludes detailed and broadly applicable rulemaking.[14]

Generally, an agency should develop policy through rulemaking; the process offers numerous advantages both to the public and the agency. The primary advantage for the agency is that rulemaking provides a process to create a cogent, fully-developed program, while simultaneously allowing the public an opportunity to participate in the development of that program.[15]

E. Overview of the Contested Case Process

Frequently, Iowa statutes require that a particular decision be preceded by an opportunity for an evidentiary hearing — called a contested case hearing. A full explanation of the contested case process would require an entire textbook.[16] The contested case process set out in Code sections 17A.10 through 17A.18A resembles, in simplified form, the procedural protections that are provided in judicial proceedings. A contested case proceeding can also be mandated by the due process clause of the Iowa Constitution or the United States Constitution.[17] Not every agency action creates a right to a contested case. Generally, an opportunity for a contested case hearing must be provided when the agency action deprives a person of a property interest (e.g., revocation of a license). A contested case is similar to a judicial hearing, except that it is held before an administrative agency, not a court. The IAPA creates a trial-type process that uses a presiding officer instead of a judge. The presiding officer can be an administrative law judge or the agency itself (e.g., director, a board, or commission). The contested case hearing does not involve the use of a jury.

The contested case hearing provides many of the due process of law protections found in judicial hearings. The most important of these is the right to a decision based solely on the testimony and evidence introduced into the record made during the evidentiary hearing. In virtually any other type of agency decision making, such as rulemaking or waivers, the agency can base its decision on information gained from whatever source it chooses. In a contested case, however, the basis for that decision must be found within the record.

F. Overview of Judicial Review — Process — Code Section 17A.19

Virtually any agency action that impacts individual rights, duties, or responsibilities can be appealed through the judicial system. This includes rulemaking, contested case decisions, petitions for waiver, or any other action. The judicial review process is detailed in Code section 17A.19. During judicial review of a contested case decision, the court cannot, in most situations, hear further evidence concerning issues of fact whose determination was entrusted to the agency. The court's broad range of remedies includes

[14] For example, the Grow Iowa Values Fund provides millions of dollars for a variety of new and existing economic development efforts. The variety of efforts drawing support from the Grow Iowa Values Fund precludes the use of detailed criteria to govern all awards from the fund. See Iowa Code § 15G.108.

[15] In his writings, Professor Bonfield offers a variety of detailed reasons why the rulemaking process is a superior means of policymaking. Arthur E. Bonfield, State Administrative Policy Formulation and the Choice of Lawmaking Methodology, 42 Admin. L. Rev. 21 (1990).

[16] See Arthur E. Bonfield, *The Definition of Formal Agency Adjudication under the Iowa Administrative Procedure Act*, 63 Iowa L. Rev. 285 (1977).

[17] "[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. Amend. XIV, § 1; Iowa Const. Art. I, § 9.

affirming the agency action or remanding it back to the agency for further proceedings. There are 14 grounds for overturning a decision by an agency; those grounds are detailed in Code section 17A.19(10). The court may overturn the agency's decision if it violates one of those specific grounds and a party's substantial rights have been prejudiced.[18] The court is bound by the agency's findings of fact "if supported by substantial evidence in the record as a whole," but the court is not bound by the agency's interpretation of the law and may substitute its own interpretation for that of the agency.[19]

G. Recordkeeping Requirements in the IAPA — Code Section 17A.3

Code section 17A.3 can be viewed as a simplified open records law specifically for state rules and policy. This provision is more specific than the Iowa Public Records Law, Iowa Code chapter 22. Code section 17A.3 requires agencies to develop rules detailing their practice, procedure, and organization, and requires that certain types of information be retained and indexed for ready public access. Code section 17A.3(1) requires rulemaking to completely describe agency operations and procedures and requires that all agency policy be maintained and indexed according to name and subject matter.

The required rulemaking provisions in Code section 17A.3(1), paragraphs "a" and "b," require that every agency establish rules of organization and operation, essentially a "flow chart" detailing agency organization, operation, and chain of command. The required rules also include rules of practice and procedure along with a description of all forms made available to the public. Note that an all-inclusive set of practice and procedure rules is not required.[20] A description of all forms used by the agency does not require that the actual text be placed in rule — just a general description is adequate.

Code section 17A.3(1), paragraphs "d" and "e," require the maintenance and indexing of agency law to facilitate easy public inspection. These two provisions require the indexing and availability of all agency policy and all agency decisions affecting individuals — if there is an agency policy that could affect the public, it must be readily available and easily found. An exemption is provided for certain confidential information.

H. Delegation of Authority

The fundamental principle concerning the scope of agency rulemaking was established over 50 years ago—rules cannot be adopted that are at variance with statutory provisions or that amend or nullify legislative intent.[21] The scope of an agency's rulemaking authority is limited by two factors: the amount of rulemaking power that can be constitutionally delegated to an administrative agency and the terms of the statutory delegation itself. An administrative agency does not have any independent lawmaking power. An agency has only that authority which is either expressly or by necessary implication delegated to that agency.[22] This principle is codified in Code section 17A.23.[23]

---

[18] Meyer v. IBP, Inc., 710 N.W.2d 213, 218 (Iowa 2006) (citing Iowa Code § 17A.19(10)).
[19] Id. at 218-19.
[20] See, e.g., Anstey v. Iowa State Commerce Commission, 292 N.W.2d 380, 387 (Iowa 1980) (holding that the commission's failure to adopt certain rules relating to the use of forms did not amount to a rulemaking omission so substantial as to void the proceedings).
[21] Bruce Motor Freight, Inc. v. Lauterbach, 247 Iowa 956, 971, 77 N.W.2d 613, 616 (Iowa 1956).
[22] Wallace v. Iowa State Board of Education, 770 N.W. 2d 344 (Iowa, 2009).
[23] "An agency shall have only that authority or discretion delegated or conferred upon the agency by law and shall not expand or enlarge its authority or discretion beyond the powers delegated to or conferred upon the agency." Iowa Code § 17A.23. This statutory provision may provide more detail than does the common law, by more clearly identifying the source of agency authority.

When rules adopted by an administrative agency exceed the agency's statutory authority, the rules are void and invalid.[24]

When determining the scope of an agency's rulemaking authority the initial step is to examine the statutory language itself to determine whether the delegation itself is lawful. As recently as 1994, the Iowa Supreme Court struck down legislative delegations of authority that were excessive.[25] The delegation must contain "a clear delineation of legislative policy and substantive standards to guide the agency in its implementation of that policy."[26] However, precise substantive guidelines or standards are not required in the legislation if adequate procedural safeguards are provided. Such procedural safeguards must advance the legislative purpose and must preclude arbitrary, capricious, or illegal conduct by the agency.[27] The IAPA is a complete set of procedural safeguards that both channels agency discretion and provides a mechanism for judicial review. A statute that sets out general substantive guidelines or standards and requires compliance with the IAPA will probably pass judicial scrutiny.

The validity of an administrative rule is measured by a four-part test. Each one of these parts is closely tied to the scope of authority:[28]

- The statute itself must be constitutional.
- The statute must specifically authorize the promulgation of administrative rules either expressly or by necessary implication.
- The procedure specified for the promulgation of rules must be followed.
- The adopted rule must be within the authority of the agency and be reasonable.

1. Authority to Promulgate a Rule: Express Language or Necessary Implication

An express delegation of rulemaking authority is obvious — the agency's enabling statute specifically authorizes or mandates rulemaking.[29] Even express delegations contain some limitations. A general delegation of rulemaking authority does not grant to an administrative agency unlimited power to regulate matters within the agency's expertise.[30] If the statute merely authorizes rulemaking (e.g., "may promulgate") but does not mandate it, the agency remains free to create its policy either by rule or on a case-by-case basis.[31] The authority to promulgate a rule is not an obligation to promulgate a rule. The following excerpt from Code section 89A.3 provides a good example:

---

[24] Motor Club of Iowa v. Department of Transportation, 251 N.W. 2d 510, 517-18 (Iowa 1977).

[25] In re C.S., 516 N.W.2d 851 (Iowa 1994). In this case, the General Assembly created special committees to review and reduce the placement of special needs children in out-of-state foster care facilities. Committee approval was required to obtain state payment for out-of-state care. The statute contained no standards to channel the discretion of these committees, nor were there any administrative appeals procedures allowing individuals to contest the committee action. The court found this lack of procedural safeguards and substantive standards voided the statute as an undue delegation of legislative power.

[26] Id. at 859.

[27] In re D.C.V., 569 N.W.2d 489, 497 (Iowa 1997).

[28] Iowa Revenue Department v. Iowa Merit Employment Commission, 243 N.W.2d 610, 615 (Iowa 1976) (identifying three requirements for the validity of an administrative rule). This Guide splits the third requirement identified by the court in *Iowa Merit Employment Commission* into two separate requirements.

[29] Auen v. Alcoholic Beverages Div., 679 N.W.2d 586, 590 (Iowa 2004) describing the agency's authority to adopt rules that was included in the legislation.

[30] Litterer v. Judge, 644 N.W. 2d 357, 363-64 (Iowa 2002).

[31] See Young Plumbing, 276 N.W.2d at 382.

1. The safety board may adopt rules governing maintenance, construction, alteration, and installation of conveyances, and the inspection and testing of new and existing installations as necessary to provide for the public safety, and to protect the public welfare.

2. The safety board shall adopt, amend, or repeal rules pursuant to chapter 17A as it deems necessary for the administration of this chapter, which shall include but not be limited to rules providing for:

a. Classifications of types of conveyances.

b. Maintenance, inspection, testing, and operation of the various classes of conveyances.

c. Construction of new conveyances.

d. Alteration of existing conveyances.

e. Minimum safety requirements for all existing conveyances.

f. Control or prevention of access to conveyances or dormant conveyances.

g. The reporting of accidents and injuries arising from the use of conveyances.

h. The adoption of procedures for the issuance of variances.

i. The amount of fees charged and collected for inspection, permits, and commissions. Fees shall be set at an amount sufficient to cover costs as determined from consideration of the reasonable time required to conduct an inspection, reasonable hourly wages paid to inspectors, and reasonable transportation and similar expenses.

j. Submission of information such as plans, drawings, and measurements concerning new installations and alterations.

The language in Code section 89A.3(1) is permissive. Accordingly, the agency is not required to establish a general policy on the subjects specified in that subsection. The language in Code section 89A.3(2) is a mandate; the statute enumerates nine specific areas where the agency must promulgate rules.

The scope of a delegation can be drastically affected depending on whether rulemaking authority is granted generally to implement an entire chapter of the Code or is limited to a specific section or sections of a statute. An agency has only the authority delegated to it and cannot expand that delegation beyond the language of the statute. [32] Note that authority to promulgate a rule can come from sources other than a statute. For example, a decision by the Iowa Supreme Court interpreting the meaning of a statute could serve as authority for a rule that reflects that decision.

Rulemaking by "necessary implication" is less apparent than a specific delegation of authority but it still is an important source of rulemaking authority. An implied delegation of rulemaking authority occurs when an agency is empowered to make a decision or take action that affects individual rights, duties, or responsibilities, or even

[32] See Iowa Code § 17A.23. ("An agency shall have only that authority or discretion delegated to or conferred upon the agency by law and shall not expand or enlarge its authority or discretion beyond the powers delegated to or conferred upon the agency.") Smith-Porter v. Iowa Dept. of Human Services, 590 N.W.2d 541 (Iowa 1999).

to simply administer a statutory mandate. For example, the power to adjudicate or to conduct a contested case implies the power to promulgate procedural rules for the conduct of those contested cases. It is legislative intent that determines whether agency decision making must be accomplished through rulemaking or on a case-by-case basis.[33]

The nature of the legislative delegation is critical to determine the scope of review on judicial review of an agency's interpretation of a statute. As set out in Code section 17A.19(10), if the agency has been clearly vested with interpretive authority, the court will generally defer to the agency's interpretation, and grant relief only if the agency's interpretation is "irrational, illogical, or wholly unjustifiable." If the agency has not been clearly vested with discretion to interpret the statute, the court is free to substitute its own judgment for that of the agency. Interpretation of a statute has been clearly vested in the agency's discretion where the precise language of the statute, its context, the purpose of the statute, and the practical considerations involved indicate that the General Assembly intended (or would have intended had it considered the question) to delegate to the agency interpretive power with the binding force of law over implementation of the provision in question.[34]

2. Substantial Compliance

Strict compliance with the rulemaking procedures set out in Code sections 17A.4 through 17A.8 is not required to establish a valid rule — the IAPA requires only "substantial compliance."[35]

III. Definition of Agency — Code Section 17A.2

Code section 17A.2(1) defines an "agency" as "each board, commission, department, officer, or other administrative office or unit of the state. Agency does not mean the General Assembly, the judicial branch or any of its components, the Office of Consumer Advocate, the Governor, or a political subdivision of the state or its offices and units." Note how this definition is both inclusive and exclusive because it applies to any administrative unit, regardless of its name or its location within an umbrella agency, while at the same time containing a number of exclusions.

A. Administrative Office or Unit

The definition essentially encompasses any government entity that has the authority to affect the rights, duties, or responsibilities of persons through rulemaking, adjudication, or informally in action. This definition excludes purely advisory groups.

---

[33] See, e.g., Iowa Power and Light Co. v. Iowa State Commerce Commission, 410 N.W.2d 236 (Iowa 1987). In Iowa Power and Light Co., the Iowa Commerce Commission (ICC) (now the Iowa Utilities Board) was empowered to set rates for the purchase, by regulated utilities companies, of electricity generated by small windmills and low-head dams. The statute set out four criteria to be considered in setting the rates. The ICC set a single, statewide rate by rule. The Iowa Supreme Court voided this rule, stating: "[N]owhere in the disputed statutory scheme is the commission empowered to adopt a uniform statewide rate...The statutes instead demand that the commission consider the unique individual circumstances surrounding each utility and resolve the rates disputes by contested case proceedings." Id. at 241.

[34] Arthur E. Bonfield, Amendments to Iowa Administrative Procedure Act, Report on Selected Provisions to the Iowa State Bar Association and Iowa State Government, p. 68 (1998).

[35] Iowa Code § 17A.4(5).

B. State Government Purview

The "of the State" clause in the agency definition clearly excludes any unit of local government such as cities, counties, or school boards. The rulemaking process applies only to state agencies.

C. Agency Exclusions and Requirements

The term "agency" does not include the General Assembly, the judicial branch or any of its components, the Office of Consumer Advocate, the Governor, or a political subdivision of the state or its offices and units. The judicial branch has a complete exemption that includes any administrative agencies within that branch of government. The General Assembly and the Office of the Governor have less encompassing exemptions which do not specifically exempt agencies housed within those two bodies. Of the over 100 rulemaking entities in the executive branch of government, only the Office of the Consumer Advocate is exempted from the IAPA.

The quorum requirement for agency action is also a significant part of this definition. For agencies headed by boards or commissions, Code section 17A.2(1) states "[u]nless provided otherwise by statute, no less than two-thirds of the members eligible to vote of a multimember agency constitute a quorum authorized to act in the name of the agency."[36]

The words "no less" in the quorum requirement mean that if two-thirds results in a fraction of a member, such fraction is to be rounded up to the nearest whole number, not merely rounded off. For example, in a five-member board, two-thirds translates into 3.33 members; this is rounded up to four members, not down to three. The Administrative Rules Review Committee (ARRC) has adopted its own policy concerning quorums. The ARRC insists that any action taken by a board or commission be based on a majority vote of the entire board or commission. The ARRC will object or take other action on any rule that allows board or commission action based on a majority of those present and voting.[37] The rationale behind this requirement is that policies that have the force and effect of law should be considered and approved by a full majority of the body. However, standard voting procedure for legislative bodies, taken from both *Mason's Manual of Legislative Procedure* and *Robert's Rules of Order*; calls for a simple majority of those present and voting.[38] The problem is that an actual minority could establish policy if several of the members simply abstained from voting. The ARRC requirement ensures that an actual majority of a board or commission adopts a policy.

IV. Definition of Administrative Rules

A. General Definition — Code Section 17A.2

Under Code section 17A.2(11), the definition of "rule" has two components: a broad definition followed by a series of narrow exemptions. This definition makes it impossible to avoid the rulemaking process by calling a statement by some other name; if a statement

[36] Statutes generally establish a quorum as a majority of the members of the board or commission.
[37] Administrative Rules Review Committee Rules of Procedure: 1.3(2). (Iowa ARRC 2007).
[38] Robert, Robert's Rules of Order, Newly Revised, § 191 (1970); Mason, Mason's Manual of Legislative Procedure, § 510 (2000).

meets the three criteria contained in the definition, it is a rule and must be adopted through the process outlined in Code sections 17A.4 and 17A.5.

Section 17A.2(11) states in part:

> "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of any agency. . . . The term includes the amendment or repeal of an existing rule . . . .[39]

Within the definition itself are three distinct components that establish the broadest possible application.

The word "statement" is a generic word. Accordingly, if a statement falls within the statutory definition, the rulemaking requirements must be followed, regardless of how that statement is titled or styled.

The phrase "general applicability" refers to statements that apply to groups or classes as opposed to statements which apply only to named individuals based on their specific fact situation. Statements that apply to specific individuals are handled through contested cases, declaratory rulings, or other agency actions. The phrase general applicability does not necessarily mean applicable to everybody or to society as a whole. It means only that the statement applies to some identifiable group or segment of society, even if that group in fact has only one member.[40]

The phrase "implements, interprets, or prescribes law or policy" covers any action relating to the creation or interpretation of a policy. It does not matter whether the agency is establishing a policy with the force and effect of law or simply interpreting what the law might mean. This provision differs significantly from the federal Administrative Procedure Act, which excludes so-called interpretive rules from the process.[41]

In certain narrow situations, even an executive order of the Governor can be subject to the rulemaking requirements. "Executive order" is not defined in the Code of Iowa. Traditionally, an executive order is a formal document used by the Governor to establish policy internal to the executive branch. Some gubernatorial powers, such as rules recision under Code section 17A.4(8), must be exercised by executive order. As a gubernatorial function these orders are exempt from the rulemaking process; however, Code section 17A.2(11) specifically provides that an executive order or other gubernatorial directive is subject to rulemaking if it creates an agency, establishes a program, or transfers a program between agencies established by statute or rule.

B. Exclusions From the Rulemaking Process — Code Section 17A.2

Twelve specific, narrow exclusions for certain agency statements are set out in Code Section 17A.2(11), paragraphs "a" through "l." These exclusions are to be interpreted narrowly; Code section 17A.23 specifically states that the IAPA is to be "construed broadly

---

[39] The definition in Iowa Code § 17A.2(11) is based on the rule definition provision of the federal Administrative Procedure Act, 5 U.S.C. § 551(4).

[40] See, e.g., Anaconda Co. v. Ruckelshaus, 482 F.2d 1301 (10th Cir. 1973). In *Anaconda Co. v. Ruckelshaus*, the Tenth Circuit upheld federal emission restrictions set out in regulation and applicable in a single Montana county, even though there was only a single source for those emissions.

[41] 5 U.S.C. § 553.

to effectuate its purposes." These purposes, set out in Code section 17A.1, can be summarized as: legislative oversight of agency actions; increased public accountability by agencies; increased public access to government information; and increased public participation in government decision making. These purposes are best met by a broad interpretation of the term "rule" to maximize the number of agency statements that must go through the process. Consequently, the impact of the exclusions must also be minimized to ensure that the maximum number of agency statements go through the process. Note that other statutes may define something as a rule, thus making the rulemaking process applicable, even though the statement may qualify under one of the Code section 17A.2(11) exclusions.[42]

Although Code section 17A.2(11) contains 12 specific exemptions, they are best presented by grouping them into several categories. The exclusions in paragraphs "a" and "c" apply to certain internal management statements and interagency communications or directives. In essence, these provisions exempt personnel, general management, and housekeeping matters that are of little interest to the public. These exclusions are specifically limited to statements that do not substantially affect the legal rights of the public.

The exclusions in paragraphs "b," "d," "e," and "j" are statements that do not meet the exact definition of a rule and that are not subject to rulemaking requirements. To eliminate any uncertainty, these functions were given specific exemptions. Paragraph "b" exempts declaratory orders. Declaratory orders are established in Code section 17A.9 as a mechanism to obtain binding advice from an agency, based on a specific set of facts. Since a declaratory order is tied to a specific fact situation, it may serve as precedent for further decisions, but it has no immediate general applicability. Simply put, declaratory orders are not statements of general applicability and are therefore not administrative rules.

Paragraph "d" exempts decisions in contested cases. The underlying principle for the exemption is similar to that for declaratory orders. It should be emphasized, however, that the precedent set in contested case decisions is a major source of state policymaking. Agencies should consider adopting rules to codify precedent when it becomes so well developed that it has broad and frequent application.

Paragraph "e" excludes opinions of the Attorney General. These opinions constitute legal advice from an attorney to a client, albeit being public information.

Paragraph "j" excludes a decision not to exercise a discretionary power. This is limited to situations where the agency declines to act in a particular fact situation, not where general policy is involved.[43]

Paragraph "f" excludes government policies that need to be secret to maintain effective administration of the law. To claim coverage under this provision the agency must show that: (1) publication would allow law violators to escape detection; (2) publication would encourage disregard for the law; or (3) publication would give unfair advantage to persons in an adverse position to the state. For example: The highway speed limit is not rigidly enforced at that speed. The Iowa Highway Patrol observes an informal five mile-per-

[42] Iowa Code § 17A.1(2) ("[N]othing in [the IAPA] is meant to abrogate in whole or in part any statute prescribing procedural duties for an agency which are greater or in addition to those provided here.").
[43] Sand v. Iowa Department of Social Services, (Iowa Dist. Ct. 1977).

hour grace margin. If this was adopted as a rule, the public would routinely violate the statute and drive at the higher speed.

Paragraph "g" excludes from rulemaking the prices charged for goods or services. The exemption applies when the state is, in effect, acting as a merchant, selling a good or a service, such as sales conducted by Prison Industries. Fees, such as license fees, are not excluded and must be adopted as rules. A fee is part of an overall regulatory scheme; a sort of government monopoly where a fee must be paid in order to participate.

Paragraphs "h" and "i" exclude statements relating to the maintenance, care, and public use of a state building or property. These statements, such as "keep off the grass," must be available as signs.

Paragraph "k" excludes statements relating only to inmates of a penal institution, students enrolled in a state school, or patients in a state hospital, when those statements are issued by that agency. Note the exclusion applies to statements relating only to those named groups; if the statement affects family, visitors, or other members of the public, the exclusion does not apply.[44]

Paragraph "l" excludes advisory opinions of the Iowa Ethics and Campaign Disclosure Board.

V. Regulatory Principles Governing Rulemaking — Executive Order No. 9

In 1999, Governor Thomas Vilsack established Executive Order No. 9,[45] which contains a series of general principles establishing a philosophical framework for agency policymaking. That order also requires all administrative agencies to appoint an agency rulemaking coordinator as the contact point for the agency's rulemaking activities. The principles established in the order are as follows:

- To the extent permitted by statute, and wherever applicable, each agency shall only issue rules that are authorized by state law and that aid in interpreting the law or serve an important public need. In deciding whether and how to regulate, each agency shall assess all costs and benefits of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, each agency shall select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages) and that are most equitable in their result.
- Each agency shall identify and assess the significance of the specific problem any contemplated regulation intends to address.
- To the extent that it is reasonable and practicable, each agency shall examine whether existing rules (or laws) have created or contributed to the problem that a

[44] Airhart v. Iowa Department of Social Services, 248 N.W.2d 84, 85 (Iowa 1977). In this case the court held that an individual on parole was not an "inmate" within the meaning of Iowa Code § 17A.2.
[45] Exec. Order No. 9 (Sept. 14, 1999).

new rule is intended to correct, and whether those rules (or laws) should be modified to achieve the intended goal of regulating more effectively.

- Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior or providing information upon which choices can be made by the public.
- Each agency shall, in setting its regulatory priorities, consider the varying degrees and natures of the risks posed by the different substances or activities within its jurisdiction.
- Each agency shall design its rules in the most cost-effective manner to achieve the desired regulatory objective. In doing so, each agency shall consider incentives, innovation, consistency, predictability, enforcement, and compliance costs (to government, regulated entities, and the public), flexibility, and equity.
- Each agency shall assess both the costs and the benefits of contemplated rules and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a rule only upon a reasoned determination that the benefits of the intended rule justify its costs and that the rule is the best available method of achieving the desired regulatory objective, consistent with the other principles contained in this section.
- To the extent that it is reasonable and practicable, each agency shall base its decisions on scientific, technical, economic, and other information concerning the need for, and consequences of, the intended rule.
- Each agency shall identify and assess alternative forms of regulation and shall, to the extent that it is reasonable and practicable, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt.
- To the extent that it is reasonable and practicable, each agency shall seek the views of appropriate local officials or their representatives before imposing regulatory requirements that might specifically or uniquely affect those governmental entities. Each agency shall assess the effects of its contemplated rule on local governments, including the availability of resources to carry out those mandates, and seek to minimize those burdens that uniquely or significantly affect such governmental entities consistent with achieving regulatory objectives. In addition, as appropriate, agencies shall seek to harmonize their rulemaking actions with related local regulatory and other governmental functions.
- Each agency shall avoid rules that are inconsistent, incompatible, or duplicative with its own rules or those other state agencies.
- Each agency shall narrowly tailor its rules to impose the least possible burden on society, including, individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations.

- Each agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.

VI. Procedure for Adoption of Rules — Code Section 17A.4

A. Uniform Rules for Agency Procedure

The uniform rules on agency procedure[46] were drafted in 1985 by a task force headed by Professor Arthur Bonfield. The rules were also amended by the Iowa Attorney General's office in 1998 in response to legislative revisions to Code chapter 17A. The uniform rules cover petitions for rulemaking, declaratory orders, agency procedures for rulemaking, fair information practices under Code section 22.8, and contested cases. The rules are in the form of examples that agencies may utilize, rather than uniform requirements imposed on all agencies without deviation.

B. Rulemaking Docket

Both the uniform rule and Executive Order No. 9 call for agencies to maintain a rulemaking docket; generally maintained by each agency on its internet site.[47] The docketing requirement requires agencies to list each "anticipated" rulemaking proceeding. A rulemaking proceeding is considered "anticipated" from the time a draft of proposed rules is distributed for internal discussion within the agency.

The docket must also contain detailed items of information concerning pending rulemaking. Those items include:

- The subject matter of the proposed rule.
- A citation to all published notices relating to the proceeding.
- Where written submissions on the proposed rule may be inspected.
- The time during which written submissions may be made.
- The names of persons who have made written requests for an opportunity to make oral presentations on the proposed rule, where those requests may be inspected, and where and when oral presentations may be made.
- Whether a written request for the issuance of a regulatory analysis, or a concise statement of reasons, has been filed, whether such an analysis or statement or a fiscal impact statement has been issued, and where any such written request, analysis, or statement may be inspected.
- The current status of the proposed rule and any agency determinations with respect thereto.
- Any known timetable for agency decisions or other action in the proceeding.
- The date of the rule's adoption.

[46] The text of these rules is available at: http://www.legis.iowa.gov/DOCS/Rules/Current/UniformRules.pdf.
[47] The central Internet site for state agencies is: http://phonebook.iowa.gov/agency.aspx.

- The date of the rule's filing, indexing, and publication.
- The date on which the rule will become effective.
- Where the rulemaking record may be inspected.

C. Notice and Public Participation — Code Section 17A.4(1)

The rulemaking process begins when the agency submits a notice of intended action to the Governor's Administrative Rules Coordinator for publication in the internet publication, the Iowa Administrative Bulletin (IAB).[48] The agency must also submit a copy of the notice to the chairpersons and ranking members of the appropriate standing committees of the General Assembly for additional study.[49] The IAB is similar to the Federal Register, containing both notices of intended actions and the text of all rules adopted in final form. It may also contain opinions of the Attorney General, opinions of the Supreme Court, and various other notices approved by the ARRC. Publication in the IAB is legally sufficient to support a rulemaking, but it is only a minimum notice. Agencies are free to use more extensive notice if they choose and, in some cases, statutory provisions can require more extensive notice. In addition, Code section 17A.4 also requires each agency to mail direct notices to trade and occupational associations as requested; however, the failure to mail such direct notices does not invalidate the rulemaking process.[50]

D. Notice of Intended Action

The notice must be published in the IAB not less than 35 days before the proposal can be adopted in final form. The notice must contain either the "terms or substance" of the proposal or set out a description of the matters involved.[51]

The scope of the notice is set by the agency. A notice of intended action can address an entire rule, an entire chapter of rules, or it can change individual words within a particular rule. A notice can either add new rules, amend existing rules, or delete existing rules. A notice is not restricted to one particular rule or issue, so a single rulemaking can embrace a large number of related or even unrelated changes.

While the actual text of the rule is not necessarily required to be published in the IAB, the notice must contain enough information for the average person to understand the nature and scope of the proposal. If the actual text of the rule is not published in the IAB, the agency must provide a copy of the text upon request. A rule cannot be adopted in final form unless the text of the proposal was either published or made available by the agency. There are a number of reasons why the text of a rule might not actually be published with the notice:

(1) The text may be too lengthy, some rules can be several hundred pages in length. In these cases the administrative code editor has discretion not to publish the text when that publication would be "unduly cumbersome, expensive, or otherwise inexpedient."[52]

---

[48] Individual bulletins may be found at: http://www.legis.iowa.gov/IowaLaw/AdminCode/bulletinSupplementListing.aspx. See also: Appendix C
[49] 2010 Acts ch. 1031, §52.
[50] Iowa Code § 17A.4(1)(c).
[51] Iowa Code § 17A.4(1)(a).
[52] Iowa Code § 2B.5A(3).

(2) The text may already be readily available as part of a national standard or published federal regulation. Note that Code section 17A.6(2) requires that an electronic copy of the publication be submitted to the administrative code editor for publication on the General Assembly's Internet site. If an electronic copy of the publication is not available, the agency must deliver a printed copy of the publication to the Administrative Code Editor who shall deposit the copy in the state law library where it shall be made available for inspection and reference.

(3) The text may not yet be developed. An agency may choose to place under notice a general idea or concept, using the notice process as a means of soliciting public comment on that proposal. Once the actual text of the rule is developed, a second notice must then be published to begin the rulemaking process.

The preamble of the notice appears prior to the text or the summary and contains a synopsis of the subject and a citation to the specific statutory authority for the proposal. The notice must include a brief explanation of the principal reasons for its action and a brief explanation of the principal reasons for its failure to provide in that rule for the waiver of the rule in specified situations if no such waiver provision is included in the rule.[53] The preamble also contains standard "boilerplate" language as to the availability of a public hearing and the time and method for the submission of written comments. At times preambles can be pages long, with the agency using it as a mechanism to present its thinking behind the proposal or to detail its history.

E. Fiscal Note — Code Section 17A.4

Code section 17A.4(4) requires that an agency prepare a fiscal impact analysis for all proposed rules with an annual expenditure of $100,000 or an expenditure of $500,000 within five years, which outlines expenditures by "all affected persons, including the agency itself." The Legislative Services Agency analyzes the statement and provides a summary of the analysis to the ARRC. The analysis required by the statement is not intended to rival the detail and research required for the regulatory analysis set out by Code section 17A.4A. Fiscal impact analysis provides a general overview of the financial costs, both to the agency and to those persons subject to the rule. The analysis does not, however, include intangible considerations, such as the value of time lost. To the extent practicable, expenditures are expressed in dollar amounts. In those cases where the agency cannot establish a dollar figure, a range of costs or a general discussion of the impact are acceptable.

The Legislative Services Agency has developed a worksheet/form for the fiscal impact analysis. As a practical matter the form must be completed for every rulemaking, even if it merely indicates that the dollar thresholds have not been met.

F. Regulatory Analyses — Code Section 17A.4A

This section is an amalgamation of two earlier provisions; one providing for an economic impact statement, and a second providing for a regulatory flexibility analysis. Each regulatory analysis must include quantifications of the data and must take into

[53] Iowa Code § 17A.4(2). This waiver language was a legislative compromise enacted in lieu of an actual waiver provision generally applicable to all rules.

account both short-term and long-term consequences. An agency must issue a regulatory analysis of a proposed rule if an appropriate request is made within 32 days after the notice is published. When an analysis has been requested, the agency must extend the time for public comment on the proposed rule for 20 days beyond the date a summary of the analysis is published in the IAB. For rules adopted on an "emergency" basis, the summary must be published within 70 days of the request. A regulatory analysis may be requested by the ARRC or the Governor's Administrative Rules Coordinator (ARC) and must contain all of the following:

- A description of the classes of persons who probably will be affected by the proposed rule, identifying those who will benefit from the rule and those who will bear the costs.
- A description of the probable quantitative and qualitative impact of the proposed rule, economic or otherwise, upon affected classes of persons, also identifying the costs of compliance.
- The probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.
- A comparison of the probable costs and benefits of the proposed rule to the probable costs and benefits of inaction.
- A determination of whether less costly methods or less intrusive methods exist for achieving the purpose of the proposed rule.
- A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.

An agency must issue a small business regulatory analysis of a proposed rule, upon request, if the rule would have a substantial impact on small business. The request for this small business analysis may be made not only by the ARRC or the ARC, but also as a result of a petition of at least 25 persons who each qualify as a small business or by an organization representing at least 25 such persons. The agency must reduce the impact of a proposed rule that would have a substantial impact on small business by using these methods if that action is legal and feasible. This analysis must determine whether it would be reasonable to:

- Establish less stringent compliance or reporting requirements in the rule for small business.
- Establish less stringent schedules or deadlines in the rule for compliance or reporting requirements for small business.
- Consolidate or simplify the rule's compliance or reporting requirements for small business.
- Establish performance standards to replace design or operational standards in the rule for small business.
- Exempt small business from any or all requirements of the rule.

As an adjunct to this regulatory analysis, the General Assembly's ARRC is specifically charged by Code section 17A.33 with the duty to review the impact of regulation on small business.

G. Fiscal Impact Statement for Local Government — Code Section 25B.6

The statutory provision relating to the fiscal impact on local governments is technically not part of Code chapter 17A, but as a practical matter it is part of the rulemaking process. Code section 25B.6 begins with a general prohibition against rules which mandate expenditures by political subdivisions or their contracting entities which are not required or authorized by statute. It then requires a proposed administrative rule, which increases annual expenditures more than $100,000 by all affected political subdivisions, to be accompanied by a fiscal impact statement outlining the costs. The statement must be submitted to the ARC for publication in the IAB along with the notice of intended action and to the Legislative Fiscal Committee of the Legislative Council.

H. Opportunity for Public Presentation

The public must be allowed not less than 20 days to submit written comments to the agency regarding a proposed rule, and the method and deadlines for these submissions must be set out in the initial notice. The notice must also identify the mechanism for requesting an "opportunity for oral presentation."[54] Public participation is open to "all interested persons" — literally anybody. The phrase encompasses any person or entity: individuals, corporations, or associations. A particular legal interest is not required; anybody is entitled to offer comment on a proposed rule without regard to the nature of their interest.

The "opportunity for oral presentation" is established in Code section 17A.4(1)(b). This phrase was specifically chosen to ensure there was no confusion with a due process, judicial-type hearing. The oral presentation was originally conceived as an alternative to written comments, designed for those persons who could not effectively make written presentations.[55] This "opportunity" is nothing more than the right to express views and make arguments. It does not include the myriad of due process rights that are expected in a trial-type hearing, such as the right to cross-examine other witnesses, the right to a decision based solely on the evidence introduced into the record, or the right to an unbiased decision maker. In short, this "opportunity for oral presentation" is simply a public hearing on a proposed rule. Legally, it provides the public with the right to deliver oral comments before a representative of the agency and places an obligation on the agency to give those comments full and fair consideration. Twenty days' notice of the hearing must be given by publishing the notice in the IAB. Unlike written submissions, a hearing of oral presentations is not an automatic right. Only a limited number of persons or entities can demand that a hearing be held: the ARRC; a petition signed by 25 persons; a group representing 25 persons; a government agency; or the Governor. The availability is limited because a hearing can be expensive and time consuming for the agency. This process eliminates the ability for any single individual to disrupt the process. When the agency

[54] Iowa Code § 17A.4(1)(b).
[55] Arthur E. Bonfield, The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, The Rulemaking Process, 60 Iowa L. Rev. 731, 853 (1975).

does not schedule a hearing in the initial notice, a subsequent request delays the entire rulemaking process for over 40 days. Notice must be published for 20 days, plus a minimum 19-day editorial delay to get the notice published in the IAB. For this reason, agencies routinely schedule a hearing as part of any rulemaking that might be controversial.

I. Conducting an Opportunity for Oral Presentation

Once an oral presentation is scheduled, participation is not limited to the persons or groups who made the initial request; anyone is entitled to attend and make a presentation. A transcript (verbatim testimony) is not required at the oral presentation; notes or a tape recording are sufficient. There is no statutory requirement that the agency provide a presiding officer that actually interacts with the public; however, the uniform rules call for the agency's presiding officer to be familiar with the substance of the proposed rule, to preside at the meeting, and to prepare a synopsis summarizing the contents of the presentations made at the meeting.

J. Agency Consideration of Comments

Code section 17A.4(1)(b) requires that the agency "consider fully all written and oral submissions." Agency policymakers are not required to be present at the meeting, nor are the final agency decision makers required to review the tapes, minutes, or submissions of the rulemaking proceeding.[56] However, the agency decision maker must be fully and adequately informed as to the content of the public comment; this can be accomplished through an adequately prepared staff synopsis of the public comments.

An agency is required to give public comment "full and fair" consideration.[57] However, the agency remains free to use its expertise to adopt whatever rule it determines is appropriate, as long as it can show a rational basis for that decision and that the rule is within its delegated authority. Agency decision makers need not read all public submissions, but they must be familiar with the basic content.

K. "Record" in a Rulemaking Proceeding

Iowa law does not require rulemaking on the record; the decision to adopt a rule does not need to be supported by testimony or other evidence in a record. An agency is free to obtain information from any source it wishes and its ultimate decision need not be based on, or supported by, materials or comments submitted by the public. A rulemaking record is simply the collection of written and oral comments and other materials generated as part of the rulemaking. The uniform rules provide a framework for the creation of a rulemaking record. The record must be maintained for at least five years and must consist of:

- Copies of all publications in the IAB with respect to the rule or the proceeding upon which the rule is based and any file-stamped copies of agency submissions to the ARRC concerning that rule or the proceeding upon which it is based.
- Copies of any portions of the agency's public rulemaking docket containing entries relating to the rule or the proceeding upon which the rule is based.

[56] Schmitt v. Iowa Department of Social Services, 263 N.W.2d 739, 746 (Iowa 1978).
[57] Iowa Citizen/Labor Energy Coalition, Inc. v. Iowa State Commerce Commission, 335 N.W.2d 178, 182 (Iowa 1983).

- All written petitions, requests, and submissions received by the agency, and all other written materials of a factual nature as distinguished from opinion that are relevant to the merits of the rule and that were created or compiled by the agency and considered by the agency head, in connection with the formulation, proposal, or adoption of the rule or the proceeding upon which the rule is based, except to the extent the agency is authorized by law to keep them confidential; provided, however, that when any such materials are deleted because they are authorized by law to be kept confidential, the agency shall identify in the record the particular materials deleted and state the reasons for that deletion.
- Any official transcript of oral presentations made in the proceeding upon which the rule is based or, if not transcribed, the stenographic record or electronic recording of those presentations, and any memorandum prepared by a presiding officer summarizing the contents of those presentations.
- A copy of any regulatory analysis or fiscal impact statement prepared for the proceeding upon which the rule is based.
- A copy of the rule and any concise statement of reasons prepared for that rule.
- All petitions for amendment or repeal or suspension of the rule.
- A copy of any objection to the issuance of that rule without public notice and participation that was filed pursuant to Code section 17A.4(2) by the ARRC, the Governor, or the Attorney General.
- A copy of any objection to the rule filed by the ARRC, the Governor, or the Attorney General, pursuant to Code section 17A.4(4), and any agency response to that objection.
- A copy of any significant written criticism of the rule, including a summary of any petitions for waiver of the rule.
- A copy of any executive order concerning the rule.

L. Concise Statement: A Record That Is Based on the Agency's Decision

In a rulemaking proceeding, the public is not entitled to a decision based on the evidence in the record, but the public can demand that the agency create a record for its decision. Any interested person may request that the agency prepare "a concise statement of the principal reasons for and against the rule it adopted, incorporating therein the reasons for overruling considerations urged against the rule."[58]

This provision requires a synopsis of the most important arguments for and against the proposal. An analysis of every detail is not required; however, all of the principal reasons for the final adoption of the rule must be included in the statement. The failure to include all of the reasons supporting a rule adoption in the statement means only those reasons contained in the statement can later be introduced in court to justify the rule.[59] The request

[58] Iowa Code § 17A.4(2).
[59] Iowa Speech and Hearing Assn. v. Dept. of Social Services, No. 0-97 2-6390 (Iowa Court of Appeals, 8-26-80).

may be made at any time during the rulemaking and up to 30 days after the final adoption. The statement must be completed within 35 days of receipt of the request.

The request for a concise statement forces the agency to review and analyze all the testimony and other written material submitted during the rulemaking. Additionally, the agency must set out all of its reasons for adopting the rule over public objections. This means the agency will have to identify any information considered by the agency from the rulemaking proceeding and any other sources.

M. Period for Adoption — Code Section 17A.4(1)(b)

The notice period is limited — the agency has 180 days to either adopt the proposal in final form or terminate the rulemaking. The notice period begins either on the date the notice was published, or the date of the last oral presentation, whichever is later. The 35-day publication period for a notice of intended action is a minimum. A rule proposed by a notice of intended action can be adopted no sooner than 35 days after publication of the notice of intended action. Generally, adoption of a proposal takes longer; that precise timing occurs only in noncontroversial rulemaking proceedings where each time deadline has been met. Substantive proposals require full and fair consideration before adoption by the agency. The first 20 of the 35 days of the process are dedicated to public participation; this leaves only 15 days for consideration and analysis of that public comment. Commonly, the notice period runs 45 to 90 days, depending on the complexity of the public comment. A rule proposed by a notice of intended action that is not adopted within the maximum period of 180 days is void and the process must begin again.

N. Requirement for Substantial Compliance — Code Section 17A.4(5)

A rule is void unless promulgated in "substantial compliance" with the mandates of the rulemaking process. The phrase "substantial compliance" does not require strict adherence to every procedural detail. There are three basic criteria that measure substantial compliance:

- The extent to which injury resulted from the procedural defect.
- The extent to which the defect could have deprived anyone of the opportunity to participate in the process.
- The extent to which the defect was an isolated occurrence or part of an ongoing scheme to avoid the requirements of the rulemaking process.[60]

All three of these factors are examined together, and if the defect did not significantly involve any one of these criteria, then the rulemaking remains valid. Generally speaking, the principle "no harm, no foul" applies.

O. Statute of Limitations — Code Section 17A.4(5)

Unless the validity of a rulemaking proceeding is challenged within two years of the effective date of the rule, the proceeding will be presumed valid. The assumption is that a rule should not be forever clouded by a procedural defect which is unrelated to the

[60] See Bonfield, Arthur E., State Administrative Rulemaking, p. 362 (Little, Brown & Co., 1986) (providing a detailed analysis of the concept of "substantial compliance").

substance of the rule. This presumption of validity means that a rule cannot be challenged on procedural grounds once two years have passed since the completion of the rulemaking; any defect not challenged within that period is deemed cured. Note this presumption applies only to possible procedural defects; the substance of a rule can be challenged at any time a person is "aggrieved or adversely affected" by the rule.[61]

VII. Adoption and Effective Date of Rules — Code Section 17A.5

A. Overview

The notice and the public participation requirements constitute only the first half of the rulemaking process. A proposed rule is not effective until three things occur; these requirements constitute the publication portion of the rulemaking process:

- The rule proposed by a notice of intended action is adopted in final form.
- The adopted rule is filed with the ARC.
- The adopted rule is again published in the IAB for 35 days before it becomes effective and also indexed and codified in the Iowa Administrative Code (IAC).

Not less than 35 days after the publication of the notice of intended action the agency may adopt the proposed rule in final form. Adoption can occur on the 35th day. During the notice process the agency has collected and reviewed the public comment offered on the proposal. At the conclusion of the notice period the agency decision maker makes whatever changes may be necessary or desirable and formally adopts the final rule. The preamble to each adopted rule must contain "a brief explanation of the principal reasons for its action . . . . ."[62] This preamble is not part of the rule itself and will not appear in the IAC. This requirement is in addition to the statement of principal reasons which must be prepared only upon request, and is far less detailed than the statement of principal reasons. One caveat, however, is that this requirement is substantially similar to the concise statement of principal reasons, implying that the common law interpreting the concise reasons provisions may well be applicable. Common law essentially holds that the failure to include all of the principal reasons supporting a rule adoption in the statement means only those reasons contained in the statement can later be introduced in court to justify the rule.[63]

B. Changing the Text From Notice to Adoption

The most controversial issue in the rulemaking process is the extent to which the text of a rule proposed by a notice of intended action can be changed prior to the final adoption of the rule. An agency may make changes in the text of a noticed rule based on the comments received during the rulemaking process or for any other reason. Under Iowa law, even substantial changes can be made to a rule proposed by a notice of intended action as long as those changes are within the scope of the original notice and a logical

[61] Iowa Code § 17A.19.
[62] Iowa Code § 17A.4(2).
[63] Iowa Speech and Hearing Assn. v. Dept. of Social Services, No. 0-97 2-6390 (Iowa Court of Appeals, 8-26-80).

outgrowth of the comment received on the proposal.[64] Professor Arthur Bonfield has developed a three-part test to functionally determine whether changes to a proposed rule are so extensive that they exceed the scope of the original notice. When that occurs, the entire rule must again be placed under notice. The factors considered in this test are:

- The extent to which all persons affected by an adopted rule should have understood that the published proposed rule would have affected their interests.
- The extent to which the subject matter of the adopted rule or issues determined by that rule are different from the subject matter or issues involved in the published proposed rule.
- The extent to which the effects of the adopted rule differ from the effects of the published proposed rule had it been adopted instead.[65]

C. Details of Adoption: Procedure and Effect

The decision-making head of the agency, as determined by statute, is the entity which adopts a rule in final form. In a single-headed agency, authority is usually vested in the director, but authority to actually sign the document can be delegated to an assistant. On boards or commissions, a vote of the entire body is required. Adoption is evidenced by certifying an original copy of the adopted rule. A certified copy is actually little more than a signed copy; an affidavit or notarized signature is not required. In essence, certification means that the signor attests the document as being true or as represented.

Adoption is, in effect, a waiver by the agency of any further right to make changes in the rule. The agency declares that the terms and substance of the rule are now fixed. At that point, for the agency, the rulemaking process is finished — if any additional changes are needed, even technical corrections, a new rulemaking process must begin.

D. Filing With the Administrative Rules Coordinator

In 2006, Code section 17A.5(1) was revised in response to a new paperless filing process developed in the Governor's office. The earlier process required that three copies of the adopted rule be filed with the Governor's ARC, with two forwarded to the Administrative Code Editor (ACE). Under the new process, custom-designed computer software takes a proposal from the drafting and internal approval stage though the filing process.

The ARC is an integral part of the Governor's office. The ARC serves several functions:

- The office serves as the filing point for all rulemaking.

[64] Iowa Citizen Labor Energy Coalition, 335 N.W.2d at 180-81 (stating that the adequacy of notice is to be decided on a functional basis and that a notice must be sufficiently informative to assure interested persons an opportunity to participate intelligently in the rulemaking process). As to the extent of permissible modification, the *Iowa Citizen* court stated: "[The notice requirements are] not to be a straightjacket for agencies. . . . The requirement of submission of a proposed rule for comment does not automatically generate a new opportunity for comment merely because the rule promulgated by the agency differs from the rule it proposed. . . . Even substantial changes in the original plan may be made so long as they are in character with the original scheme and a logical outgrowth of the notice and comment already given." Id. at 181 (citation and quotation omitted).

[65] Arthur E. Bonfield, State Administrative Rulemaking, p. 235 (Little, Brown and Co., 1986).

- The ARC assigns each filing a specific number. Most rulemaking proceedings will ultimately have two of these numbers; one for the notice of intended action and a second for the final adopted rule. The numbers are used to track the progress of the filing throughout the process.
- The ARC advises the Governor concerning rulemaking issues.

E. Publication and Indexing

Both publication and indexing are critical to ensure that the public is able to actually find the rules that they must obey. There is an additional 35-day waiting period, but this period is not an additional opportunity for comment. In essence, it is a grace period allowing the new rule to be published, distributed, and reviewed by the general public before it goes into effect. The delay provides affected individuals with an opportunity to bring their affairs into compliance with the new requirements. The publication process is actually the most important part of the rulemaking process, because it is the only provision that is required by the Constitution. The Fourteenth Amendment to the United States Constitution provides that no person may be deprived of life, liberty, or property without due process of law. A fundamental part of due process is the right to notice. Relative to administrative rules, this means that a right exists to have a published copy available before the rule is enforced against a particular individual.

F. Effective Date

A rule can be made effective no sooner than 35 days after the rule is adopted in final form, filed with the ARC, and published in the IAB.[66] At the same time, the text is incorporated into the IAC. Agencies may specify a later effective date, so long as that date is set out in the filing. Frequently, agencies prefer to set the first of the month, or even the first of the following year, as the effective date.

In calculating the precise moment, the actual date of publication is excluded from the calculation. A published rule goes into effect on the 35th day (e.g., 34 days plus one minute). Each issue of the IAB contains a chart calculating every step of the rulemaking process, including the earliest effective date for each rulemaking period.

VIII. Emergency Rulemaking Process — Code Sections 17A.4(3) and 17A.5(2)(b)

A. Overview

Normal rulemaking takes a minimum of 108 days (including publication delays); however, frequently rulemaking proceedings last six months or longer. These delays can hamstring an agency's ability to swiftly react to emergency situations. The need to react swiftly to changing circumstances was a major reason why agency rulemaking was initially created in the first place. Code chapter 17A has two procedures which can be used individually or jointly to either shorten or even eliminate delays caused by the rulemaking process. These two procedures have been nicknamed the "emergency" rulemaking process, but that name is a misnomer and does not appear in Code chapter 17A. The

[66] Iowa Code § 17A.5(2).

process is not limited to emergency situations and the word "emergency" does not even appear in the statute.

B. Mechanism

The emergency rulemaking process is a combination of Code section 17A.4(3), relating to the publication of a notice of intended action, and Code section 17A.5(2)(b), relating to effective dates. Since there are two different parts to the rulemaking process, there are also two procedures to be followed in shortening the process.

To eliminate the notice requirements, an agency must make a finding under Code section 17A.4(3) that notice and public participation would be "unnecessary, impracticable, or contrary to the public interest . . . " To reduce or eliminate the publication period, an agency must make a finding that the immediate effective date is authorized by statute; that the rule confers a benefit or removes a restriction; or that the rule is necessary due to an imminent peril to the public health, safety, or welfare. The underlying facts that support these findings must also be set out in the document. These three grounds cover general situations where the value of having a rule in place outweighs the value of providing notice and public participation. The three grounds are alternatives—any one is individually sufficient to support a filing without notice.

The term "impracticable" is defined as infeasible, unwise, or imprudent. Rulemaking is impracticable when notice and public participation would automatically prevent the agency from functioning. An example would be newly enacted legislation calling for a specific effective date. In addition, the legislation must be supplemented through rulemaking. In this situation the "impracticable" exemption might apply, since any delay in rulemaking would result in a delay in the implementation of the statute. The term "unnecessary" means useless or needless.[67] Rulemaking is unnecessary when the rule is strictly ministerial or routine, such as changing an address; in such cases notice and public participation would be a waste of time and effort. The term "contrary to the public interest" is a catch-all phrase that requires a balancing test. The agency must weigh the value of notice and public participation against the value of quick implementation of the rule.

C. Automatic Exemptions From the Rulemaking Process

A significant amount of rulemaking is purely routine; such as changes mandated by federal law where the state agency has no choice and no discretion to amend the federal policy. Such changes, especially in the area of Medicaid policy, are commonplace and generally noncontroversial. For this type of repetitive rulemaking, a mechanism exists to allow an entire class of rules to be exempted from public participation. The agency may adopt a rule detailing a "very narrowly tailored category of rules" which are to be automatically exempted from the rulemaking process.[68] Such a rule makes the required statutory findings for the entire class of rules. Once the exemption rule is effective, each time that specified class of rule is amended the agency need no longer establish specific reasons for the emergency filing in each rulemaking proceeding. The agency simply cites the adopted rule that already contains the reasons for the emergency filing.

---

[67] Arthur E. Bonfield, The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, The Rulemaking Process, 60 Iowa L. Rev. 731, 863 (1975).
[68] Iowa Code § 17A.4(3).

D. Making Rules Effective Prior to Publication — Code Section 17A.5(2)(b)

A rule cannot be effective prior to its filing with the ARC, but it can be made effective on the date of filing or any subsequent date, as specified by the agency in the filing. There are two methods of advancing the effective date of an adopted rule. Code section 17A.5(2)(b), subparagraph (1), creates an automatic exemption when the "statute so provides." This provision is frequently used when legislation creates a new regulatory program which the General Assembly wishes to have quickly implemented. In those situations the legislation contains language specifically calling for the adoption of emergency rules.

Code section 17A.5(2)(b), subparagraphs (2) and (3), create a series of grounds that can be used to advance the effective date of a filed rule. These grounds are based on federal provisions, but also add a third "imminent peril" provision.

Code section 17A.5(2)(b), subparagraph (2), provides for an advanced effective date if the rule "confers a benefit or removes a restriction on the public or some segment thereof . . . ." Note the term "benefit" is not some generic benefit — it must be real and specific. In theory, all administrative rules confer a benefit on the public. However, due to the requirement that exemptions from the rulemaking process be narrowly construed, the benefit must be an identifiable, tangible benefit that must be provided to a specific group.

Code section 17A.5(2)(b)(3) also provides the effective date is necessary because of an "imminent peril to the public health, safety or welfare." In its application, this exemption requires the peril to be immediate and threatening.

All three exemptions in Code section 17A.5(2)(b) are narrower and more clearly defined than are the grounds to eliminate notice and public participation. Unlike notice and public participation, the publication of law or regulation is a constitutionally protected right. For that reason, the provisions making rules effective prior to publication are more restrictive.

There are special notice requirements for emergency implemented rules. When a rule is placed into effect without notice, Code section 17A.5(2)(b)(3) requires that the agency make "reasonable efforts" to inform all persons who may be affected by that rule. What is "reasonable" will vary with the circumstances. If only a few persons are affected, then actual, individual notices may be required. If a rule has a more general impact, use of appropriate mass media will be adequate. This means "constructive" notice — a reasonable person should have known that the rule existed. The key issue is the type of notice that will be most effective; cost will be a secondary consideration. The failure to provide some type of notice probably makes the rule voidable, at least to those persons who did not have actual knowledge of its existence.

E. Remedies for the Abuse of the Emergency Rulemaking Provisions

Code section 17A.4(3) specifically provides that the agency must show good cause for filing a rule without notice. This means that the filing must cite the specific reasons which justify the particular finding. Only those reasons set out in the filing can be used, in subsequent judicial review, to support the emergency filing.

The burden of proof on judicial review is on the agency. Agency actions are normally accorded a presumption of validity by a reviewing court and the plaintiff must show, by

clear and convincing evidence, that grounds exist to overturn that action. Pursuant to Code section 17A.5(2)(b), subparagraph (3), the burden of proof is on the agency to prove the validity of an emergency filing. This provision, however, does not apply to the substantive validity of the rule; it applies only to its procedural validity.

Emergency rules can be "sunsetted by objection." Like other rules, emergency rules may be permanent; however, the Governor, the Attorney General, or the ARRC may file an objection to an emergency rule pursuant to Code section 17A.4(3). This action has the effect of terminating the filing 180 days after the objection is filed. Within that time period the agency must complete a rulemaking proceeding to supplant the emergency filing.

F. "Double-barreled" Filing

This rulemaking method was devised as a way to counteract any objection to an emergency rule filing; it does not appear in Code chapter 17A. When an agency implements an emergency rule it also publishes a notice of intended action using the normal process, thus providing for public participation. The rule proposed by this notice is ultimately adopted and replaces the rule adopted under the earlier emergency filing.

IX. Waiver of Administrative Rules — Code Section 17A.9A

Any person may petition an agency for a waiver or variance from the requirements of a rule. The decision to grant or deny this petition is within the sole discretion of the agency. An agency may issue a waiver or a variance only if all of the following apply:

- The agency has jurisdiction over the rule.
- The waiver or variance is consistent with any applicable statute, constitutional provision, or other law.
- Granting the request would not waive or vary any requirement created or duty imposed by statute.

Additionally, the burden of persuasion rests with the person who petitions the agency. The agency may choose to grant the petition if it finds, based on clear and convincing evidence, all of the following:

- The application of the rule would pose an undue hardship on the person for whom the waiver or variance is requested.
- The waiver or variance from the requirements of a rule in the specific case would not prejudice the substantial legal rights of any person.
- The provisions of a rule subject to a petition for a waiver or variance are not specifically mandated by statute or another provision of law.
- Substantially equal protection of public health, safety, and welfare will be afforded by a means other than that prescribed in the particular rule for which the waiver or variance is requested.

Like any other agency action, any waiver or variance could serve as precedent concerning future agency actions. To ensure that waivers and variances do not have broad application, the statute demands that the agency evaluate these petitions on the "unique,

individual circumstances" set out in the petition; and that any waiver or variance is drafted to provide the narrowest exception possible to the provisions of the rule. The agency may place any condition on a waiver or a variance that the agency finds desirable to protect the public health, safety, and welfare.

A waiver or variance is not permanent unless the petitioner can show that a temporary waiver or variance would be impracticable. If a temporary waiver or variance is granted, there is no automatic right to renewal. At the sole discretion of the agency, a waiver or variance may be renewed if the agency finds all of the factors listed above remain valid. A grant or denial of a waiver or variance petition is indexed, filed, and available for public inspection as provided in Code section 17A.3. All agencies must maintain a list of their waivers and variances, updated semi-annually. All waivers are now listed at a special Iowa Internet site: https://art.iowa.gov/art/index.php.

X. Publication of Administrative Rules

A. Overview

The publication and distribution of administrative rules is a mammoth undertaking. The process not only requires the prompt publication and distribution of newly implemented rules, but also the elimination of rescinded rules; all of this is done on a two-week cycle. The basic problem with any official code publication is timeliness. For example, the Code of Iowa contains Iowa's statutory law. A new Code is published every two years, but during that time the General Assembly has met twice, enacting new statutes. Thus the Code of Iowa is supplemented by both an annual "session law" publication and a Code Supplement. The timeliness problem is even more severe with administrative rulemaking, which occurs continuously. New rules are issued approximately 26 times per year, making bound supplements impracticable. The state's solution is to publish rules via an Internet site at: http://www.legis.iowa.gov/IowaLaw/AdminCode/agencyDocs.aspx.

B. Publication Process — Code Sections 2B.5A, 17A.5(1), and 17A.6

Code sections 2B.5A, 17A.5(1), and 17A.6 ensure that newly adopted rules are promptly published and distributed on a statewide basis. The publication process begins when a copy of the rulemaking document is electronically submitted by the agency to the ARC. The entire submission process is now done electronically. The ARC assigns an "ARC" number to each document. That number is used to trace and index that particular document. Most rulemaking procedures have two distinct ARC numbers; one for the initial notice and a second for the final adoption. These numbers are not used to identify a rule in the IAC.

C. Adoption by Reference — Code Section 2B.5A(3)

The IAC does not contain the actual text of every administrative rule.[69] A large amount of rulemaking either implements verbatim federal regulation or various types of national codes, such as building or electrical codes. In these cases, the material is actually

[69] See Iowa Code § 2B.5A(3a) providing that the Administrative Code Editor may omit from the IAC any rule which would be "unduly cumbersome, expensive, or otherwise inexpedient. . . .". The Administrative Code Editor rarely, if ever, uses this discretion. Far more common is the adoption of a rule by reference.

published through other sources. Often, especially in the area of engineering codes, the material is used by a highly specialized and limited readership. In those cases, drafting the actual language into Iowa rules would be impracticable and of limited utility. Instead, the solution is to simply adopt a rule that references the material by a citation and its physical location. Code section 17A.6(2) specifically requires that an agency which adopts material by reference must provide an electronic copy to the ACE for publication on the General Assembly's Internet site, or if an electronic copy is not available, deliver a copy of the publication containing the standards to the ACE for deposit in the State Law Library where it is available for inspection and reference.

All adoptions by reference must be limited to a "date certain." This may be the date the material is published, the date it was made effective, or any other date that ties the material to a specified point in time. The effect is that the adoption by reference does not include any later amendments to the adopted material.

There are three reasons for this "date certain" limitation. The first reason is practical; to ensure that the reader obtains the correct version of the adopted material. Without that date the reader has no guarantee that the version they have obtained is correct. The second reason is political; the ARRC has been very concerned with this issue and has consistently demanded the use of a specific date to ensure that every reader knows which version of the standard or manual is in effect.[70] The last reason is constitutional; as a legal principle, adopting a national standard or manual without a date certain is unconstitutional. The doctrine is that the power to make an Iowa law may not be delegated to a "foreign" jurisdiction. An administrative rule is for all intents and purposes a law, just as is a statute enacted by the General Assembly. Thus, rules are subject to the same constitutional constraints. When an agency adopts a standard or a manual tied to a date certain it is in essence adopting existing material into Iowa law — it literally becomes an Iowa law at that point because an Iowa lawmaking authority has adopted that text. When a specified date certain is not used the agency is not only adopting existing material into Iowa law, it is allowing that "foreign" jurisdiction to determine what Iowa law will be in the future. Such an approach constitutes an unconstitutional delegation of lawmaking authority.[71]

D. Organization of the IAC

The Code of Iowa has a single author — the Iowa General Assembly, which convenes for only a specific period each year. The IAC has over 100 authors because each agency promulgates its own rules. Moreover, rulemaking is a continuous process throughout the year. For this reason, the publication of administrative rules is not organized by subject matter; instead, it is alphabetically arranged by agency.

1. Agency Identification Number

Each agency is assigned its own space in the IAC and each agency arranges its own rules within that space. The ACE assigns each agency a number; that number is used when citing a rule, as a means of identifying the agency. Large "umbrella"

[70] ARRC rule 1.3(4) states: "Adoption of materials by reference. If a rule adopts an Iowa statute or Iowa administrative rule by reference, that adoption includes all subsequent amendments to that statute or rule. Any other material adopted by reference cannot include subsequent amendments and the citation must include a date certain identifying either the effective date or publication date of the material."

[71] 1982 Iowa Op. Atty. Gen. 439 (1982).

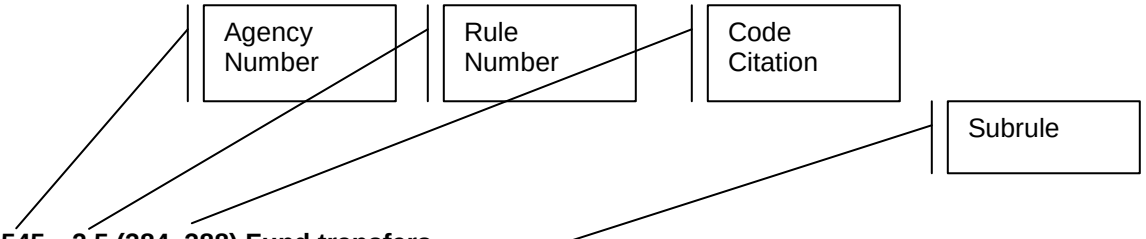
agencies are numbered in increments of 20, starting with 21. The numbers between those increments identify the divisions within those agencies and for the smaller independent agencies that have been established.

2. Reference Tools Rules Analysis.

At the beginning of each agency division in the IAC a numerical list is provided which sets out the citation and a brief description of each rule. For a small agency, this can be the fastest way to find a particular rule. This analysis lists only the rule and contains none of the subdivisions that may be part of that rule.

E. Citation of Administrative Rules

Although rules are combined into chapters and divisions, the individual rules are the building blocks of the IAC. The citation for both the IAC and the IAB are established in Code section 2B.17(5) which provides that the IAC is cited as (agency identification number) IAC; (chapter, rule, subrule, lettered paragraph, or numbered subparagraph); and the IAB is cited as IAB (volume), (number), (publication date), (page number), (ARC number).[72] The framework of a typical rule is set out in the example below:



545—2.5 (384, 388) Fund transfers.

2.5(1) *General provision*. Transfers between funds in one program are types of amendments that do not require preparation and adoption as provided in section 384.16 and are not subject to protest as provided in section 384.19, but such transfers must comply with the state laws regarding the funds and the following subrules:

2.5(2) *Emergency fund*. No transfer may be made from any fund to the emergency fund.

2.5(3) *Debt service fund*. Except where specifically prohibited by state law, moneys may be transferred from any other city fund to the debt service fund to meet outstanding principal and interest. Such transfers must be authorized by the original budget or a budget amendment which has been adopted as provided in section 384.16 and subject to protest as provided in section 384.19.

2.5(4) *Capital improvements reserve fund*. Except where specifically prohibited by state law, moneys may be transferred from any city fund to the capital improvements reserve fund for purposes specified in Iowa Code section 384.7. Such transfers must be authorized by the original budget or a budget amendment which has been adopted as provided in section 384.16 and subject to protest as provided in section 384.19.

2.5(5) *City utility fund and city enterprise fund*. Any governing body of a city utility, combined utility system, city enterprise, or combined city enterprise which has a surplus in its fund may transfer such surpluses to any other city fund, except the emergency fund, by resolution of the appropriate governing body. For the purposes of this subrule, a surplus may exist only after all required transfers have been made to any restricted accounts in accordance with the terms and provisions of any revenue bonds of loan agreements relating to the utility or enterprise fund.

A surplus shall be defined as the cash balance in the operating account or the unrestricted retained earnings calculated in accordance with GAAP in excess of:

[72] 441 IAC 79.1 means Department of Human Services, Iowa Administrative Code Chapter 79, the first rule in that chapter.

a. The amount of the expenses of disbursements for operating and maintaining the utility or enterprise for the preceding three months, and,

b. The amount necessary to make all required transfers to restricted accounts for the succeeding three months.

These rules are intended to implement Iowa Code chapters 384 and 388.

[Filed 11/4/74]
[Amendment filed 10/10/75, Notice 8/25/75—published 10/20/75, effective 11/24/75]
[Filed emergency 12/23/83 after Notice of 10/26/83—published 1/18/84, effective 12/23/83]
[Filed 11/3/88, Notice 5/4/88—published 11/30/88, effective 1/4/89]
[Filed emergency 10/2/02—published 10/30/02, effective 1/1/03]

Paragraph

History

F. Finding Administrative Rules

As demonstrated in Appendix C and Appendix D, the Iowa Administrative Code and the Iowa Administrative Bulletin are available on the Internet at: http://www.legis.iowa.gov/IowaLaw/AdminCode/adminLaw.aspx. The Administrative Code is set out alphabetically. Each agency's rules can be accessed by individual chapter or by a single PDF or RTF file containing all of the agency rules.

G. Tracing the History of an Administrative Rule

An individual's rights, duties, and responsibilities are fixed by an administrative rule as that rule existed in a particular point in time, which is not necessarily the same rule that is currently in place. Consequently, it can be important to identify the rule text in effect on a particular date. The best example is courtroom litigation. The law that applies in a particular case is the law that was in effect at the time the events occurred which lead up to the litigation. A rule can change up to several times per year; therefore, finding the text of a rule as it existed at an earlier time is a difficult task. At the end of each chapter within the IAC, a complete rulemaking history is provided for that chapter. Due to logistical problems, this history does not identify which particular rule was changed during each rulemaking. Each line of text provides the history of rulemaking, showing the date of filing, the date of the notice of intended action, the date of publication in final form, and the effective date. The last line of this text is the most recent change.

With the publication of the IAC database on the General Assembly's Internet site,[73] a history is now being developed for each individual rule change, citing the filing number and date of publication. A sample of this new history, taken from Department of Human Services rule 441-79.1, is set out below:

[**ARC 7835B**, IAB 6/3/09, effective 7/8/09; **ARC 7937B**, IAB 7/1/09, effective 7/1/09; **ARC 7957B**, IAB 7/15/09, effective 7/1/09 (See Delay note at end of chapter); **ARC 8205B**, IAB 10/7/09, effective 11/11/09; **ARC 8206B**, IAB 10/7/09, effective 11/11/09; **ARC 8344B**, IAB 12/2/09, effective 12/1/09]

[73] http://www.legis.iowa.gov/IowaLaw/AdminCode/agencyDocs.aspx.

Copies of "dead pages," (i.e., every page that has ever been in the IAC) are kept by the ACE. Each line of history can be traced to a particular page or pages stored in the ACE's office. Using this archive, it is possible to follow the evolution of a rule through its various permutations or to find the text of a rule as it existed on a particular date. Much of this archive material is now available through the General Assembly's Internet site. Every version of the IAC is now available back through 1998.

XI. Petition for Rulemaking — Code Section 17A.7

A. Overview

Code section 17A.7 creates a formal application process that allows any interested person to request that an agency adopt, amend, or repeal a rule. Anyone can make the request; there is no requirement that the petitioner have a real and direct interest or show that some legal right exists. Moreover, there is no requirement that an individual use this process prior to seeking other judicial remedies.[74] While an agency cannot be compelled to change its rule, the receiving agency is required to respond to the petition within 60 days. This process functions as a means to encourage reconsideration of existing administrative rules. Rules do not always achieve the intended results and even once efficient policies can become obsolete or outdated. The petition process allows individuals to demand that the agency reexamine its rule and respond to criticisms and suggestions concerning its future. The petition process provides individuals with the ability to bring these issues to the attention of the agency and encourage a periodical rules housecleaning.

B. Format and Agency Consideration of Petitions

A set of uniform rules, published in volume one of the IAC suggests a format for the petition process which has been largely adopted throughout state government. The document must identify the petitioner, both by name and address. The petitioner should state his or her interest in the matter at issue even though a real and direct interest is not required. An agency is not mandated to actually make the requested rule changes. For this reason, it is important to demonstrate that the petitioner has a reason for making the request; a reason that justifies the effort requested from the agency. The petition should also include the actual text of the proposed change and the arguments and evidence that support the request for change.

Within 60 days of the request, the agency must either commence rulemaking or deny the petition stating its reasons for the denial. The agency is not required by statute to hold a formal hearing on this petition, but the uniform rules call for the opportunity for an informal meeting to discuss or clarify the issues. The agency is free to decide the matter based on the information contained in the petition, but it is also free to supplement that information with any other source it chooses. Even if the agency commences rulemaking based on the petition, the agency is not required to complete rulemaking on the proposal. The agency may choose to put a proposal under notice and then make whatever modifications may be desirable after full public comment.[75] If an agency declines to grant a petition, it is unlikely a court will reverse that decision on judicial review. The purpose of the petition is to induce

[74] Lundy v. Iowa Department of Human Services, 376 N.W.2d 893, 896 (Iowa 1985).
[75] Iowa Citizen/Labor Energy Coalition v. Iowa State Commerce Commission, (Iowa Dist. Ct. 1979).

agencies to engage in a reasoned reconsideration of the existing state of the rule. The petition process requires only that the agency give "fair consideration" to the request.[76]

C. Periodic Agency Review

In 1998, a new provision was added to the petition process. The amendment allows the ARC to demand that an agency review a specified rule and issue a report on its findings.[77] This mechanism allows anyone who believes that a regulatory program is obsolete or ineffectual to request that the Governor's office order a full review of the program. The agency is then required to analyze the effectiveness of its rule and the criticisms that have been received concerning that rule. Reviews under this provision may be requested on a five-year cycle. This mechanism is not, however, extended to the ARRC. The ARRC has an independent power to review rules under Code section 17A.8(6). The periodic agency review provision is intended to provide for agency reconsideration and review of existing administrative rules on a regular basis to ensure those regulations do not become stale or obsolete.

XII. Petition for a Declaratory Order — Code Section 17A.9

Code section 17A.9 allows an individual to seek reliable advice from an agency. A petition for a declaratory order is a formal request to an agency asking it how it will apply a statute, rule, or other policy based on the specific set of facts contained in the petition. While a petition for rulemaking is an attempt to change agency policy, a petition for a declaratory order is an attempt to determine what the policy actually is on a particular point. The problem with informal advice related to a petition for rulemaking is that it does not bind the agency.[78] When the petition-for-a-declaratory process is completed, the answer binds the agency as well as the petitioner on those issues set out in the petition.

Each agency has adopted rules providing for the form, contents, and filing of petitions for declaratory orders, the procedural rights of persons in relation to the petitions, and the disposition of the petitions. Each agency's rules describe the classes of circumstances in which the agency will not issue a declaratory order and that a declaratory order must be consistent with the public interest and with the general policy of Code chapter 17A to facilitate and encourage agency issuance of reliable advice.

An agency may not issue a declaratory order that would substantially prejudice the rights of a person who would be necessarily affected by the order and who does not consent in writing to the issuance of the order. As a practical matter, an agency cannot be compelled to issue a declaratory order, for a variety of reasons. Examples include:

- A lack of legal authority. The issue presented in the petition must deal with a statute, rule, or other provision of law that is within the agency's authority.
- Unlawful activity. There is no reason for an agency to advise people how close they can come to violating the law.

[76] Community Action Research Group v. Iowa State Commerce Commission, 275 N.W.2d 217, 219-20 (Iowa 1979).
[77] Iowa Code § 17A.7(2).
[78] See Iowa Movers and Warehousemen's Ass'n v. Briggs, 237 N.W.2d 759, 768-69 (Iowa 1976) (holding that informal representations from an agency do not estop the agency).

- Unclear facts. Unless the petitioner knows all of the pertinent facts that surround the question, an answer would be useless.
- Uncertainty. The agency may be uncertain how the law should be applied.
- Overly broad impact. The ideal declaratory order applies to a very narrow fact situation. As the facts and issues become broader, the possibility of unintended and undesirable consequences increases.

XIII. Oversight of the Administrative Rulemaking Process

A. Oversight Entities

The oversight process is not a single process and is not codified in a single provision.[79] Moreover, review of administrative rules is not limited to a single entity; several entities are responsible for rules review, and each is independent of the others.

1. General Assembly

The General Assembly can reverse or modify any rule at any time by amending the underlying statutory authority of the administrative agency. In 1984, voters amended the Iowa Constitution to give the General Assembly the power to nullify any administrative rule by joint action of both chambers.[80]

2. Governor

As the "supreme executive power," the Governor has a constitutional mandate to direct the operations of the executive branch.[81]

3. Administrative Rules Coordinator

The Administrative Rules Coordinator (ARC) provides the Governor with direct control and oversight over the rulemaking process.[82] The ARC serves as the filing point for all proposed and adopted rule changes, and generally advises the Governor concerning rulemaking and administrative law issues. Often the ARC also serves as the Governor's legal counsel.

4. Administrative Rules Review Committee

This special legislative Committee was established in 1963,[83] a decade before the enactment of the IAPA, to provide general oversight over the rulemaking process on behalf of the General Assembly.

5. Attorney General

In addition to providing legal advice to most agencies, the Attorney General is empowered by Code section 17A.4 to object to administrative rules. The Attorney General has never used this objection process, nor has the office taken a formal role

[79] Statutes relating to review of rules appear in Code §§ 7.17, 17A.4, 17A.5, 17A.6, and 17A.8.
[80] Iowa Const. art. III, § 40.
[81] Iowa Const. art. IV, § 1.
[82] Iowa Code § 7.17.
[83] 1963 Iowa Acts ch. 66, § 2.

in the administrative rules review process. Assistants to the Attorney General regularly advise agencies on rulemaking matters, and the office itself maintains an attorney-client relationship with governmental agencies. Such a relationship generally precludes public review and criticism of agency rulemaking.

B. Major Powers and Framework

The more significant powers are:

1. Objection

The objection is the workhorse of the rules review process. It is used almost exclusively by the Administrative Rules Review Committee (ARRC), but is also available to the Governor and the Attorney General.[84]

The ARRC may object to a rule on a majority vote of six members. An objection may be issued for any rule, including proposed rules and those already in effect. An objection is a formal opinion that all or part of a rule is "unreasonable, arbitrary, capricious, or otherwise beyond the authority delegated to the agency." The objecting party (usually the ARRC) must then submit a written report of its findings to the affected agency and the Administrative Code Editor. Notice of the objection appears in the Iowa Administrative Bulletin and the Iowa Administrative Code.

An objection does not directly impact a rule, but it can influence a judicial action challenging the rule by shifting the presumption of a rule's validity. In an ordinary judicial proceeding, "[a]n agency rule is presumed valid and the burden is on the party challenging it to demonstrate that a rational agency could not conclude the rule was within the agency's delegated authority."[85] After an objection, however, "the burden shifts to the agency in a judicial review proceeding to prove the validity of the rule."[86] To effectively shift the burden of proof, the objection must adequately notify the agency of the grounds for its objection.[87]

According to Professor Arthur Earl Bonfield, an objection "must be sufficient to apprise the agency of the precise nature and scope of the objection." Such an objection serves two purposes. First, it alerts the agency to the exact grounds for the objection, and gives the agency an opportunity to correct the rule before facing a judicial challenge. Second, a precise objection provides a reviewing court with standards to evaluate whether a rule is "arbitrary, capricious, or otherwise beyond the authority delegated to it."[88]

If a court overturns a rule on grounds specified in an objection, the agency must pay the challenging party's court costs—including a reasonable attorney fee—from its

[84] Iowa Code § 17A.4(6).

[85] Iowa-Ill. Gas & Elec. Co. v. Iowa State Commerce Comm'n, 334 N.W.2d 748, 751–52 (Iowa 1983) (citations omitted).

[86] Id. at 752 (Iowa 1983) (citations omitted); see also Iowa Code § 17A.4(6)(a) (declaring the burden of proof shifts to the agency to establish the rule "is not unreasonable, arbitrary, capricious, or otherwise beyond the authority delegated to it").

[87] See Schmitt v. Iowa Dept. of Soc. Servs., 263 N.W.2d 739, 743 (Iowa 1978).

[88] See id. (quoting Arthur Earl Bonfield, The Iowa Administrative Procedure Act, p. 911 (1975)).

appropriations.[89] Again, the objection must properly notify the agency of the grounds for the objection to effectively shift court costs to the agency.[90]

2. Gubernatorial Recision (veto)

The Governor may rescind any administrative rule within 70 days after it becomes effective. This action is accomplished by executive order.[91]

3. Session Delay

With approval from two-thirds (seven) of its members, the ARRC may impose a session delay on an adopted rule. The action must be taken prior to the effective date of the rule. The session delay prevents an adopted rule from taking effect "until the adjournment of the next regular session of the general assembly."[92] Unlike the objection, the ARRC need not give any grounds for issuing a session delay. Following the imposition of a session delay, the ARRC must refer the rule to the leaders, the President of the Senate and Speaker of the House, who then refer the rule to each chamber's appropriate standing committee. Within 21 days of this referral, the reviewing committee must formally take action on the rule.[93] The rule becomes void only when the General Assembly passes a joint resolution formally disapproving of the rule; otherwise, the rule takes effect when the General Assembly adjourns for the session.

The IAPA did not include a session delay in its original form in 1974.[94] A 1978 amendment added a version of the session delay, giving the ARRC the power to delay the effective date of a proposed rule until the passage of 45 calendar days—excluding holidays—while the General Assembly was in session.[95] A 1986 amendment established the session delay's current form, allowing the ARRC to "delay the effective date of a rule until the adjournment of the next regular session of the general assembly".[96]

4. Seventy-day Delay

With approval from two-thirds (seven) of its members, the ARRC may impose a 70-day delay of a proposed rule.[97] As with the session delay, the action must be taken

---

[89] Iowa Code § 17A.4(6)(b).

[90] Id. § 17A.4(6)(a); see also Iowa-Ill. Gas & Elec. Co. v. Iowa State Commerce Comm'n, 334 N.W.2d 748 (Iowa 1983) (overturning a rule as invalid, but refusing to award court costs because the ARRC did not properly object to the rule as statutorily required).

[91] Iowa Code § 17A.4(8).

[92] Iowa Code § 17A.8(9). The General Assembly begins its sessions on the second Monday of each year. Iowa Code § 2.1. The General Assembly has no fixed date of adjournment, although it usually adjourns in late April or early May, soon after the legislators' per diem expires. See Iowa Code § 2.10(1) (ending the legislators' per diem 110 calendar days after the session begins in odd-numbered years, and 100 calendar days after the session begins in even-numbered years).

[93] Iowa Code § 17A.8(9) (requiring the committee act "by sponsoring a joint resolution to disapprove the rule, by proposing legislation relating to the rule, or by refusing to propose a joint resolution or legislation concerning the rule").

[94] See Arthur Earl Bonfield, The Iowa Administrative Procedure Act, pp. 934–35 (1975).

[95] Iowa Code § 17A.8. The 1978 amendment inserted a new § 17A.8(9), which stated in part:

Upon a vote of two-thirds of its members, the administrative rules review committee may delay the effective date of a rule until the expiration of forty-five calendar days, excluding legal holidays, during which the general assembly is in regular session. If a rule is delayed during the last twenty-one calendar days preceding the adoption of a resolution for sine die adjournment of a regular session, the forty-five day period shall begin to run upon the convening of the next regular session of the general assembly.

[96] Iowa Code § 17A.8.

[97] Iowa Code § 17A.4(7).

prior to the effective date of the rule. As its name implies, the 70-day delay postpones the effective date of a rule by seventy days beyond the date it would otherwise take effect. Similar to the session delay, the 70-day delay requires no grounds for the delay beyond the statutory requirement to use it "only if further time is necessary to study and examine the rule." The rule automatically takes effect upon the expiration of the 70 day delay unless the ARRC takes further action.

The 70-day delay is a neutral action; it does not imply that the ARRC is opposed to the rule. Because the ARRC does not maintain a formal docket that requires persons to register the complaints or concerns in advance of its meetings, issues do arise at its meetings at the last minute and without warning. The 70-day delay provides a mechanism to temporarily delay the proposed rule while the issues are studied and discussed.

5. General Referral

On a majority vote of six members, the ARRC may issue a general referral, referring a rule to the General Assembly.[98] Unlike the objection and delay powers, the general referral has no legal effect on a rule. It is simply a mechanism to bring particular rule issues to the attention of the General Assembly.

A general referral sends any rule—whether proposed or in effect—to the leaders of each chamber of the General Assembly. The legislative leaders then refer the rule to the appropriate standing committees for further consideration.[99] After a general referral, a rule takes effect as usual unless the General Assembly passes a joint resolution nullifying the rule or takes other action.

6. Legislative Nullification

Under the Iowa Constitution, the General Assembly has an independent power to nullify, or rescind, any administrative rule. This process is commonly known as the legislative veto. Nullifying a rule begins with the same procedure used to enact a bill; both actions require a constitutional majority vote in each legislative chamber. Unlike a bill enactment, however, a nullification resolution does not require the signature of the Governor.[100]

7. Framework

Each reviewing entity has one or more powers it may exercise over agency rulemaking to influence or delay the rulemaking process. With the exception of the general referral, objection, and the legislative nullification, all of these powers are specifically tied to the rulemaking process. Informal review can occur at any time, but only limited authority can be exerted as noted above. In essence, the framework for review extends to the period between the publication of the first notice of intended action and the final effective date of the rules.

---

[98] Iowa Code § 17A.8(7).
[99] Iowa Code § 17A.8(7).
[100] Iowa Const. art. III, § 40.

The public segment of the review process occurs on the second Tuesday of each month, at the meetings of the ARRC, although that date can be changed. The ARC sits on the committee as an ex officio, nonvoting member. The meetings generally review all rulemaking efforts published in the previous months issues of the IAB. However, the ARRC can independently review rules at any time.

Standing committees of the General Assembly can also review rules at any time. Legislative action to overturn a rule either by bill or nullification resolution can occur during the regular legislative session, generally occurring between January and May.

C. Powers of the Governor

In Iowa, the Governor is vested with the "supreme executive power."[101] This power was buttressed in 1986 with the enactment of the Reorganization Act of 1986,[102] which increased and codified gubernatorial control over the principal departments of state government. These powers, inherent in the office, exceed the statutory powers set out below. For this reason, the Governor traditionally does not often use the formal powers set out in the statute, instead using informal communications to effect changes in administrative rules.

The Governor may object to any rule, request a regulatory analysis on rules currently in the rulemaking process, and may demand that an agency hold a public hearing on a proposed rule.[103] The Governor also has two unique powers. First, the Governor has the power to rescind any rule up to 70 days after it takes effect.[104] This time period provides the Governor with a brief "wait-and-see" period, allowing roughly two months to observe the rule in operation before taking action. Unlike the ARRC's power of delay, the rules recision is effectively a veto, which the Governor can exercise for the 70-day period after a rule takes effect. The Governor rescinds a rule by issuing an executive order—a formal gubernatorial pronouncement that is signed, sealed, and published in the IAB.[105]

The second unique power allows the Governor to trigger a review process for existing rules.[106] The Governor, acting through the ARC, may require an agency to conduct a formal review of a specified rule to:

- Determine the rule's effectiveness in achieving its objectives.
- Describe significant written criticisms of the rule received during the previous five years, including a summary of any petitions for waiver of the rule received by the agency or granted by the agency.

[101] Iowa Const. art. IV, § 1. By contrast, the United States Constitution only vests the President with the "executive Power." U.S. Const. art. II, § 1. Iowa courts have never attached any significance to—and have rarely even mentioned—the Iowa Constitution's use of the word "supreme." See Ryan v. Wilson, 300 N.W. 707 (Iowa 1941); State v. Dist. Court of Jefferson Cnty., 238 N.W. 290 (Iowa 1931); Rathbun v. Baumel, 191 N.W. 297 (Iowa 1922).

[102] 1986 Iowa Acts ch. 1245.

[103] Iowa Code § 17A.4(6)(a).

[104] Iowa Code § 17A.4(8).

[105] Iowa Code § 17A.4(8). The most recent rules veto may be found in Executive Order No. 72, April 14, 2011.

[106] Iowa Code § 17A.7.

- Describe alternative solutions to resolve the criticisms of the rule, the reasons any were rejected, and any changes made in the rule in response to the criticisms as well as the reasons for the changes.[107]

D. Administrative Rules Coordinator

The ARC, established in 1978, is an integral part of the Governor's office.[108] The statutory responsibilities of the office include serving as the filing point for all notices of intended action[109] and final adoption,[110] devising a style and form for all rules,[111] overseeing the publication of the IAC,[112] and advising the Governor on rulemaking issues.[113] Often the administrative rules coordinator also serves as the Governor's legal counsel, advising on government issues generally and specifically handling extradition matters, pardons, and commutations. Although there is no statutory authority on this point, the ARC also traditionally sits as an ex officio, nonvoting member of the ARRC.

In this position the ARC can participate in the discussion and take testimony being presented on specific rules issues.

E. Administrative Rules Review Committee

1. Overview

The ARRC effectively operates like a small state agency; the ARRC is an independent agency in the legislative branch.[114] Unlike most other legislative committees, the ARRC is established by statute. The ARRC consists of 10 members, five from each house.[115] The majority leaders in the Senate and House appoint three members each, and the minority leaders in the Senate and House appoint two members each. This split guarantees equal representation between the Senate and House, and guarantees the two major political parties will each supply at least four of the ten members.[116] ARRC terms are four years,[117] which is twice the length of regular standing committee appointments.

The IAPA requires the ARRC to meet in the Capitol on the second Tuesday of every month.[118] The ARRC may also hold additional meetings as needed at any time and any place in Iowa,[119] though these meetings rarely occur. The ARRC meetings are open to the public, and give interested persons the opportunity to "be heard and

[107] Iowa Code § 17A.7(2)(b).
[108] Iowa Code § 7.17.
[109] Iowa Code § 17A.4(1)(a).
[110] Iowa Code § 17A.5(1).
[111] Iowa Code § 17A.6(2); see also Iowa Code §2B.5(4).
[112] Iowa Code § 17A.6(2).
[113] Iowa Code § 7.17.
[114] Iowa Code § 17A.8(1).
[115] Iowa Code § 17A.5(1).
[116] The ARRC approval of a delay requires seven votes, and all other ARRC action requires six votes. Therefore, ARRC action always requires bicameral—and often requires bipartisan—support.
[117] Iowa Code § 17A.8(2).
[118] Iowa Code. § 17A.8(5).
[119] Iowa Code. § 17A.8(5).

present evidence." This opportunity is treated as a right rather than a privilege.[120] In addition to the ARRC members, several state officials attend these meetings, including legislative legal counsel, the Administrative Code Editor, and the Administrative Rules Coordinator.[121] The ARRC may also require the attendance of a representative of an agency whose rule or proposed rule is under consideration.[122]

The ARRC reviews mainly proposed and adopted rules, as they appear in the IAB.[123] By tradition, any person who attends a committee meeting is entitled to speak on any item set out in the agendum. An agendum, containing specific times for each rule to be reviewed, is prepared by the staff, subject to the approval of the committee chair and 2nd vice-chair, approximately 10 days in advance of the meeting.[124]

2. Powers

a. Objection

The objection is a power available to the Governor and the Attorney General as well as the ARRC;[125] however, in practice it is used exclusively by the ARRC. At any time, the ARRC may selectively call up a rule for review and impose an objection. An objection is the ARRC's opinion that a rule is "unreasonable, arbitrary, capricious, or otherwise beyond the authority delegated to the agency."[126] This action must be taken at a formal ARRC meeting, upon a vote of six members of the ARRC. A document is prepared detailing the ARRC's findings. It is certified by the chair and then filed in the office of the Administrative Code Editor. A copy is published in the IAB and the IAC, at the end of the rules chapter.

An objection document must contain more than a simple reference to the specific statutory grounds for objection. The document must set out these grounds in detail along with a brief description of the reasons for the objection. The document must be detailed enough to apprise the agency of the precise nature and scope of the objection.[127] An objection does not impact the effective date of a rule or prevent the agency from enforcing it. An objection, instead, places a cloud on the validity of the rule by reversing the burden of proof in any subsequent judicial action contesting that validity, but only upon the grounds specified by the ARRC in the objection document. The objection removes the

---

[120] Iowa Code. § 17A.8(6).

[121] See, e.g., Minutes of the January 2004 Meeting of the Administrative Rules Review Committee 1, available at http://www.legis.iowa.gov/DOCS/LSA/ARR/ARRMinutes/2004/ANJAR005.PDF (listing in attendance: "Joseph A. Royce, Legal Counsel; Kathleen K. Bates, Administrative Code Editor, and Teresa Vander Linden, Assistant Editor; Brian Gentry, Administrative Rules Coordinator; fiscal staff, caucus staff and other interested parties.").

[122] Iowa Code § 17A.8(6).

[123] The powers of the ARRC are primarily set out in Code Sections 17A.4 and 17A.8(7) through 17A.8(10). To a great extent those powers are specifically tied to the effective date of rules; once that date is passed the ARRC's role becomes largely advisory. A major exception to this is the objection. An objection may be imposed on any rule, whether proposed or in effect.

[124] Current and archived agenda are available on the ARRC's internet site. ARRC Agendum, http://www.legis.iowa.gov/IowaLaw/AdminCode/AARCAgendum.aspx.

[125] Iowa Code § 17A.4(6)(a).

[126] Iowa Code § 17A.4(6)(a).

[127] Schmitt v. Iowa Dept. of Soc. Servs., 263 N.W.2d 739, 743 (Iowa 1978).

presumption of validity courts commonly give to an administrative rule;[128] the agency then bears the burden of proving that validity. If the agency fails to meet this burden of proof, the agency must pay both the court costs and the attorney fees for the party objecting to the rule. If the court overturns a rule on grounds not specified in the objection, attorney fees will not be awarded.

A substantive objection does not have an expiration date and will remain in effect as long as the rule itself remains in effect. Procedural objections, which are limited to ARRC findings that the proper rulemaking procedures were not followed, may expire two years after the effective date of a rule. Code section 17A.4(3) establishes a two-year statute of limitations to challenge a rule on the grounds that the notice provisions of Code chapter 17A were not followed (i.e., faulty procedure).

The objection power has no immediate effect on the implementation of a rule; it is merely the ARRC's opinion that a rule is "unreasonable, arbitrary, capricious, or otherwise beyond the authority delegated to the agency."[129] According to Professor Bonfield, since the ARRC "does not ultimately decide the validity of the rule in question," it is "hard to argue convincingly that [an objection] constitute[s] an exercise of wholly administrative (executive) function."[130]

The court will review the rule de novo, and "the effect of the committee objection is only to advise the court."[131] However, an objection can sway the court in a close case.[132] In at least one judicial challenge to a rule, "[t]he court intimated that if the objection had not been filed, it might have held the rules valid."[133]

To be effective, an objection must state the ARRC's reasons for believing the rule is "unreasonable, arbitrary, capricious, or otherwise beyond the authority delegated to the agency,"[134] and these reasons must be specific enough to notify the agency of the nature of the objection.[135] Between 2004 and 2010, the ARRC has averaged a little more than one objection every year.[136]

b. Session Delay

A session delay postpones the effective date of a proposed rule until "adjournment of the next regular session of the general assembly,"[137] which is

[128] Barker v. Iowa Department of Transportation, 431 N.W.2d 348, 349 (Iowa 1988) (describing the burden shifting that results from an objection).

[129] See Iowa Code § 17A.4(6)(a).

[130] Arthur Earl Bonfield, State Administrative Rulemaking § 8.3.3(k) (1986).

[131] See Arthur Earl Bonfield, State Administrative Rule Making Iowa Code § 8.3.3(c) (1986) ("The committee objection mechanism does not automatically invalidate an otherwise valid rule, or preclude the reviewing court from making an independent and final determination . . . .").

[132] See Arthur Earl Bonfield, State Administrative Rulemaking § 8.3.3(c).

[133] See Arthur Earl Bonfield, State Administrative Rulemaking (citing Schmitt v. Iowa Dep't of Soc. Servs., 263 N.W.2d 739, 744 (Iowa 1978)).

[134] Iowa Code § 17A.4(6)(a).

[135] See Schmitt v. Iowa Dept. of Soc. Servs., 263 N.W.2d 739, 743 (Iowa 1978) (quoting Arthur Earl Bonfield, The Iowa Administrative Procedure Act, p. 911 (1975)).

[136] The ARRC issued nine objections in the seven years between 2004 and 2010. See ARRC Minutes, http://www.legis.iowa.gov/IowaLaw/AdminCode/AARCMinutes.aspx.

[137] Iowa Code § 17A.8(9).

typically late April to early May. Prior to the effective date of an adopted rule, the ARRC may vote to delay the effective date of a rule. Unlike an objection, no statutory grounds must be established to delay a rule. The ARRC does, however, detail the reasons for its action. Often, the reasons for a delay do not involve the legality of a rule; rather, the ARRC has some general concern over the wisdom or desirability of a rule. The delay is a mechanism to force some degree of scrutiny by the General Assembly as a whole.

Notice of a session delay is printed in the IAB and the IAC, and a letter explaining the action is forwarded to the agency. Note that this delay must occur prior to the effective date of a rule. For that reason, rules made effective pursuant to Code section 17A.5(2)(b) (emergency rulemaking) cannot be delayed by the ARRC, unless the action occurs before the effective date of the rule. The delayed rule, together with a transmittal letter, is then forwarded to the President of the Senate and the Speaker of the House of Representatives, requesting that the rule be forwarded to the appropriate standing committee of the two chambers for further consideration. As provided in Code section 17A.8(9), a standing committee must review a rule within 21 days after referral, and must take formal committee action by sponsoring a joint resolution to disapprove the rule, by proposing legislation relating to the rule, or by refusing to take action. The standing committee must also inform the ARRC of its action. Unless the General Assembly acts to either nullify the rule or to amend the underlying statutory authority, the rule will automatically go into effect upon adjournment of the session.

Between 2004 and 2010, the ARRC issued an average of slightly more than one session delay every year.[138] While the session delay can severely disrupt agency action, the limited application of the session delay suggests the ARRC relies on other powers when possible and only uses the session delay when necessary. Indeed, the session delay often leads the agency to address the ARRC's concerns.[139]

c. Seventy-Day Delay

A 70-day delay is a means for the ARRC to temporarily delay a rule pending further study.[140] The ARRC's powers are largely tied to the effective date of a rule, so the delay is used to allow the ARRC to retain jurisdiction over it pending additional meetings scheduled within the specified time. Like the session delay, this temporary delay is imposed by a vote of the ARRC, with a notification letter sent to the agency and additional notification published in the IAB and the IAC. There are no grounds needed for this delay, except for an explanation that further study is desirable. Unless the ARRC takes additional action, the delay expires automatically on the 70th day.

---

[138] The ARRC issued eight session delays in the seven years between 2004 and 2010. See ARRC Minutes, http://www.legis.iowa.gov/IowaLaw/AdminCode/AARCMinutes.aspx.

[139] See, e.g., Minutes of the March 2009 Meeting of the Administrative Rules Review Committee, available at http://www.legis.iowa.gov/IowaLaw/AdminCode/AARCMinutes.aspx (stating the Department of Public Safety issued amendments in ARC 7563B to address the ARRC's concerns when it issued an earlier session delay).

[140] Iowa Code § 17A.4(7).

Between 2004 and 2010, the ARRC issued an average of four 70-day delays every year.[141] The affected agency often reported to the ARRC one or two months later it had amended the delayed rule to address the ARRC's concerns. The burden of a 70-day delay is minimal considering that the rulemaking process itself takes not less than 108 days.

d. General Referral

A general referral to the General Assembly is a mechanism to bring specific issues before the General Assembly without impacting the validity or implementation of a rule.[142] A transmittal letter is sent to the President of the Senate and the Speaker of the House, outlining the issues or questions involved in the proposed rule. The rule is then referred to the appropriate standing committee of each chamber. Since the general referral has no legal effect on a rule, it raises no serious separation of powers concerns.

F. Role of the General Assembly

The General Assembly itself can nullify any administrative rule, regardless of how long that rule might have been in effect.[143] This process is similar to the enactment of legislation except it does not need gubernatorial approval. The ARRC is largely tied to controlling statutes in the rulemaking process; the General Assembly is not. Any rule can be nullified if a constitutional (absolute) majority of the members of the Senate and House of Representatives approve.[144]

The skeletal procedure set out in the constitutional amendment specifies the use of a resolution. The General Assembly uses joint resolutions for the nullification process. Joint resolutions are the most formal resolutions used by the General Assembly, and ensure that nullification resolutions are treated with the same scrutiny as are bills. Nullification resolutions may be introduced into either chamber, and they must be referred to a standing committee. To proceed, the resolution must be passed by the committee, then placed on the debate calendar, then called up for debate, and then passed by the membership of that chamber. The entire process must then be repeated in the other chamber. The constitutional amendment does not specify when the effective date occurs for these resolutions; however, the joint rules of the Senate and House of Representatives require that the effective date of a nullification resolution be stated in the resolution.[145]

A nullification resolution has only one function, specified in the constitution; it nullifies a specific rule. It cannot be used to modify or add a rule, nor can it revise statutory language. Those actions must follow the traditional legislative process.

---

[141] The ARRC issued 28 70-day delays in the seven years between 2004 and 2010. See ARRC Minutes, http://www.legis.iowa.gov/IowaLaw/AdminCode/AARCMinutes.aspx.

[142] Iowa Code § 17A.8(7).

[143] Iowa Const. art. III, § 40. ("The general assembly may nullify an adopted administrative rule of a state agency by the passage of a resolution by a majority of all of the members of each house of the general assembly."). While the procedure is commonly referred to as a "veto," it is more properly referred to as a "nullification."

[144] This procedure requires a constitutional majority, not just a majority of those present and voting. An administrative rule nullification requires 26 votes in the Senate and 51 votes in the House of Representatives.

[145] Joint Rule 22.

Without explicit constitutional approval, legislative nullification raises major separation of powers issues. The federal courts and most state courts agree nullification is legislative action, which must pass the full legislature and be presented to the executive to have legal effect.[146] A 1967 Iowa Attorney General opinion declared the legislative veto of an administrative rule is unconstitutional for at least two reasons.[147] First, since the rule has the "force and effect of law," the legislature must satisfy the lawmaking process to change the rule.[148] Second, the rulemaking power belongs to the executive, and the review power belongs to the courts, and the legislative veto is an impermissible encroachment by the legislature on these powers.[149]

Iowa's constitution has since been amended to explicitly authorize nullification by the General Assembly.[150]

1103RR

[146] See, e.g., Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 952 (1983); State v. ALIVE Voluntary, 606 P.2d 769 (Alaska 1980); Legislative Research Comm'n v. Brown, 664 S.W.2d 907 (Ky. 1984) Opinions of the Justices, 431 A.2d 783 (N.H. 1981); Gen. Assembly of N.J. v. Byrne, 448 A.2d 438 (N.J. 1982); State ex rel. Barker v. Manchin, 279 S.E.2d 622 (W. Va. 1981). But see Mead v. Arnell, 791 P.2d 410 (Idaho 1990) (holding a veto of administrative rule by resolution is not "law," and therefore, need not be presented to the executive).

[147] 1968 Op. Iowa Att'y Gen. 78 (1967).

[148] Id. at 79–80.

[149] Id. at 80. In 1984, Iowa voters approved a constitutional amendment authorizing the legislative veto, known in Iowa as rule nullification.

[150] Iowa Const. art. III, § 40.

Appendix "A"

State Agencies

"Umbrella" agencies are set out below at the left-hand margin in **BOLD** letters. Divisions within umbrella agencies (boards, commissions, etc.) are indented and set out in lowercase type. Other autonomous and elected head agencies are included alphabetically in CAPITALS at the left-hand margin.

22 Umbrella Departments*
58 Rulemaking subunits
05 Elected head agencies
26 Independent agencies
*Agriculture is listed twice, both as an umbrella and as an elected head agency

ADMINISTRATIVE SERVICES DEPARTMENT[11]
AGING, DEPARTMENT ON[17]
AGRICULTURE AND LAND STEWARDSHIP DEPARTMENT[21]
- Agricultural Development Authority[25]
- Soil Conservation Division[27]

ATTORNEY GENERAL[61]
AUDITOR OF STATE[81]
BEEF INDUSTRY COUNCIL, IOWA[101]
BLIND, DEPARTMENT FOR THE[111]
CAPITAL INVESTMENT BOARD, IOWA[123]
CITIZENS' AIDE[141]
CIVIL RIGHTS COMMISSION[161]
COMMERCE DEPARTMENT[181]
- Alcoholic Beverages Division[185]
- Banking Division[187]
- Credit Union Division[189]
- Insurance Division[191]
- Professional Licensing and Regulation Bureau[193]
- Accountancy Examining Board[193A]
- Architectural Examining Board[193B]
- Engineering and Land Surveying Examining Board[193C]
- Landscape Architectural Examining Board[193D]
- Real Estate Commission[193E]
- Real Estate Appraiser Examining Board[193F]
- Interior Design Examining Board[193G]
- Savings and Loan Division[197]
- Utilities Division[199]

CORRECTIONS DEPARTMENT[201]
- Parole Board[205]

CULTURAL AFFAIRS DEPARTMENT[221]
- Arts Division[222]
- Historical Division[223]

EARLY CHILDHOOD IOWA STATE BOARD[249]
ECONOMIC DEVELOPMENT AUTHORITY[261]
- City Development Board[263]

IOWA FINANCE AUTHORITY[265]
EDUCATION DEPARTMENT[281]
- Educational Examiners Board[282]
- College Student Aid Commission[283]
- Higher Education Loan Authority[284]
- Iowa Advance Funding Authority[285]
- Libraries and Information Services Division[286]
- Public Broadcasting Division[288]
- School Budget Review Committee[289]

EGG COUNCIL, IOWA[301]
EMPOWERMENT BOARD, IOWA[349]
ENERGY INDEPENDENCE, OFFICE OF[350]
ETHICS AND CAMPAIGN DISCLOSURE BOARD, IOWA[351]
EXECUTIVE COUNCIL[361]
FAIR BOARD[371]
HUMAN RIGHTS DEPARTMENT[421]
- Community Action Agencies Division[427]
- Criminal and Juvenile Justice Planning Division[428]
- Deaf Services Division[429]
- Persons With Disabilities Division[431]
- Latino Affairs Division[433]
- Status of African-Americans, Division on the[434]
- Status of Women Division[435]
- Status of Iowans of Asian and Pacific Islander Heritage[436]

HUMAN SERVICES DEPARTMENT[441]
INSPECTIONS AND APPEALS DEPARTMENT[481]
- Employment Appeal Board[486]
- Foster Care Review Board[489]
- Racing and Gaming Commission[491]
- State Public Defender[493]

IOWA PUBLIC EMPLOYEES' RETIREMENT SYSTEM[495]

LAW ENFORCEMENT ACADEMY[501]
LIVESTOCK HEALTH ADVISORY COUNCIL[521]
LOTTERY AUTHORITY, IOWA[531]
MANAGEMENT DEPARTMENT[541]
Appeal Board, State[543]
City Finance Committee[545]
County Finance Committee[547]
NATURAL RESOURCES DEPARTMENT[561]
Energy and Geological Resources Division[565]
Environmental Protection Commission[567]
Natural Resource Commission[571]
Preserves, State Advisory Board for[575]
PETROLEUM UNDERGROUND STORAGE TANK FUND BOARD, IOWA COMPREHENSIVE[591]
PREVENTION OF DISABILITIES POLICY COUNCIL[597]
PROPANE EDUCATION AND RESEARCH COUNCIL, IOWA[599]
PUBLIC DEFENSE DEPARTMENT[601]
Homeland Security and Emergency Management Division[605]
Military Division[611]
PUBLIC EMPLOYMENT RELATIONS BOARD[621]
PUBLIC HEALTH DEPARTMENT[641]
Professional Licensure Division[645]
Dental Board[650]
Medicine Board[653]
Nursing Board[655]
Pharmacy Board[657]
PUBLIC SAFETY DEPARTMENT[661]
RECORDS COMMISSION[671]
REGENTS BOARD[681]
Archaeologist[685]
REVENUE DEPARTMENT[701]
SECRETARY OF STATE[721]
SHEEP AND WOOL PROMOTION BOARD, IOWA[741]
TELECOMMUNICATIONS AND TECHNOLOGY COMMISSION, IOWA[751]
TRANSPORTATION DEPARTMENT[761]
TREASURER OF STATE[781]
TURKEY MARKETING COUNCIL, IOWA[787]
UNIFORM STATE LAWS COMMISSION[791]
VETERANS AFFAIRS, IOWA. DEPARTMENT of[801]
VETERINARY MEDICINE BOARD[811]
VOLUNTEER SERVICE, IOWA COMMISSION ON[817]
VOTER REGISTRATION COMMISSION[821]
WORKFORCE DEVELOPMENT DEPARTMENT[871]
Labor Services Division[875]
Workers' Compensation Division[876]
Workforce Development Board and Workforce Development Center Administration Division[877]

Appendix "B" Diagram

THE IOWA RULEMAKING PROCESS

Iowa Code §§17A.4 through 17A.8

NOTICE OF INTENDED ACTION

35 DAYS NOTICE PERIOD

ARRC & ARC Meeting — initial review

Edited by the Administrative Code Editor

NOTICE
to the Administrative Rules Coordinator

19-day publication delay

PUBLISHED
in the Iowa Administrative Bulletin

20-day deadline for written comments, possible hearing

ADOPTION and PUBLICATION

35 DAYS PUBLICATION PERIOD

ARRC & ARC Meeting — final review

Edited by the Administrative Code Editor

FILED
with the Administrative Rules Coordinator

19-day publication delay

PUBLISHED
in the Iowa Administrative Bulletin and Code

EFFECTIVE

THE EMERGENCY PROCESS

§17A.4(3)
Eliminate notice and public participation if:
1. Unnecessary
2. Impracticable
3. Contrary to the public interest

§17A.5(2) (a) & (b)
Eliminate publication period if:
1. Statute so provides
2. Rule confers a benefit or removes a restriction
3. Imminent peril to the public health, safety, or welfare

THE RULEMAKING PROCESS TAKES AT LEAST

108 DAYS

1007RR-B

Appendix "C"-Internet access to proposed rules

LEGISLATIVE HOME PAGE

http://www.legis.iowa.gov/index.aspx

IOWA ADMINISTRATIVE CODE

IOWA LAW

Click either button for access

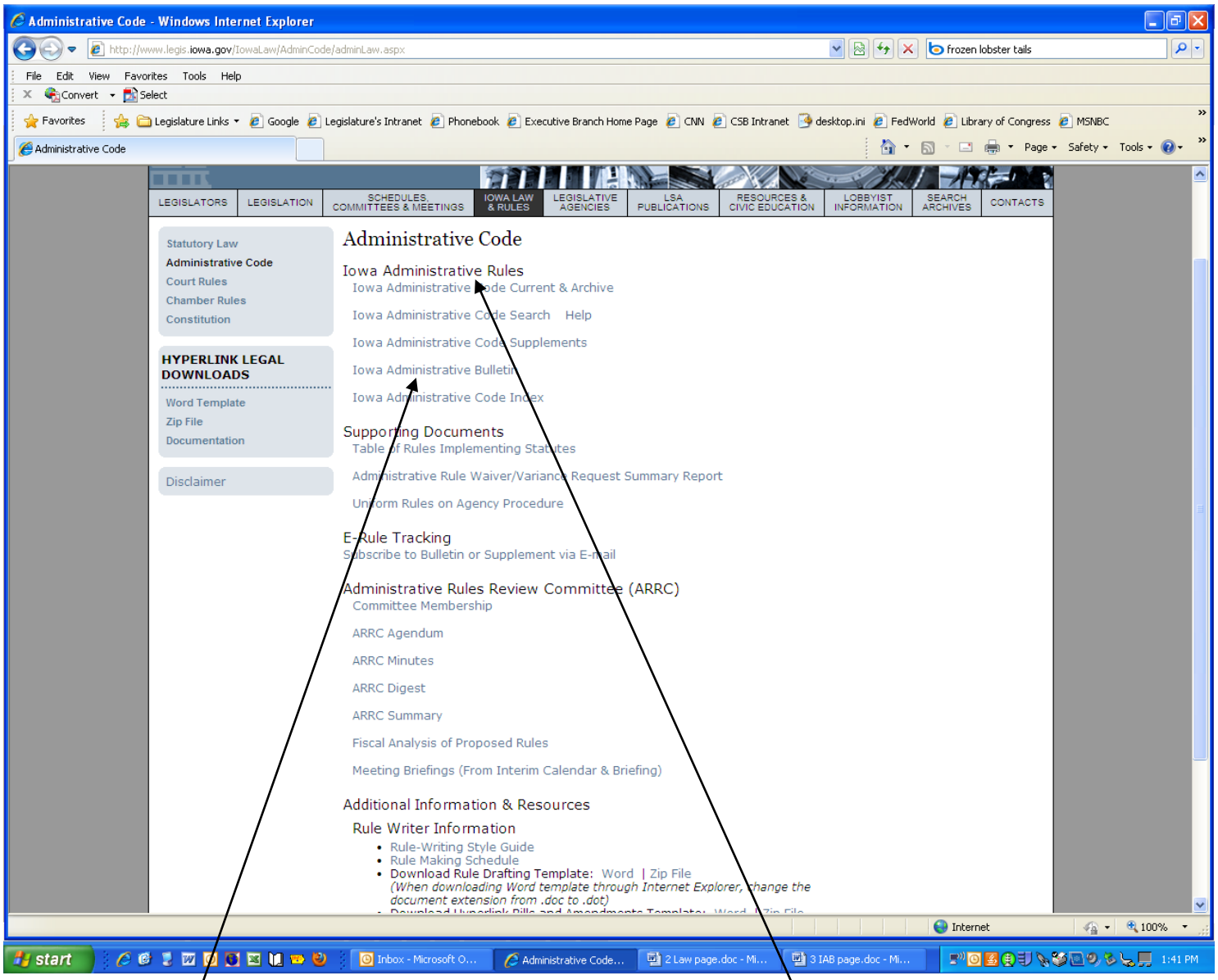
IOWA ADMINISTRATIVE BULLETIN

http://www.legis.iowa.gov/IowaLaw/statutoryLaw.aspx

IOWA ADMINISTRATIVE CODE

IAB PAGE

http://www.legis.iowa.gov/IowaLaw/AdminCode/adminLaw.aspx

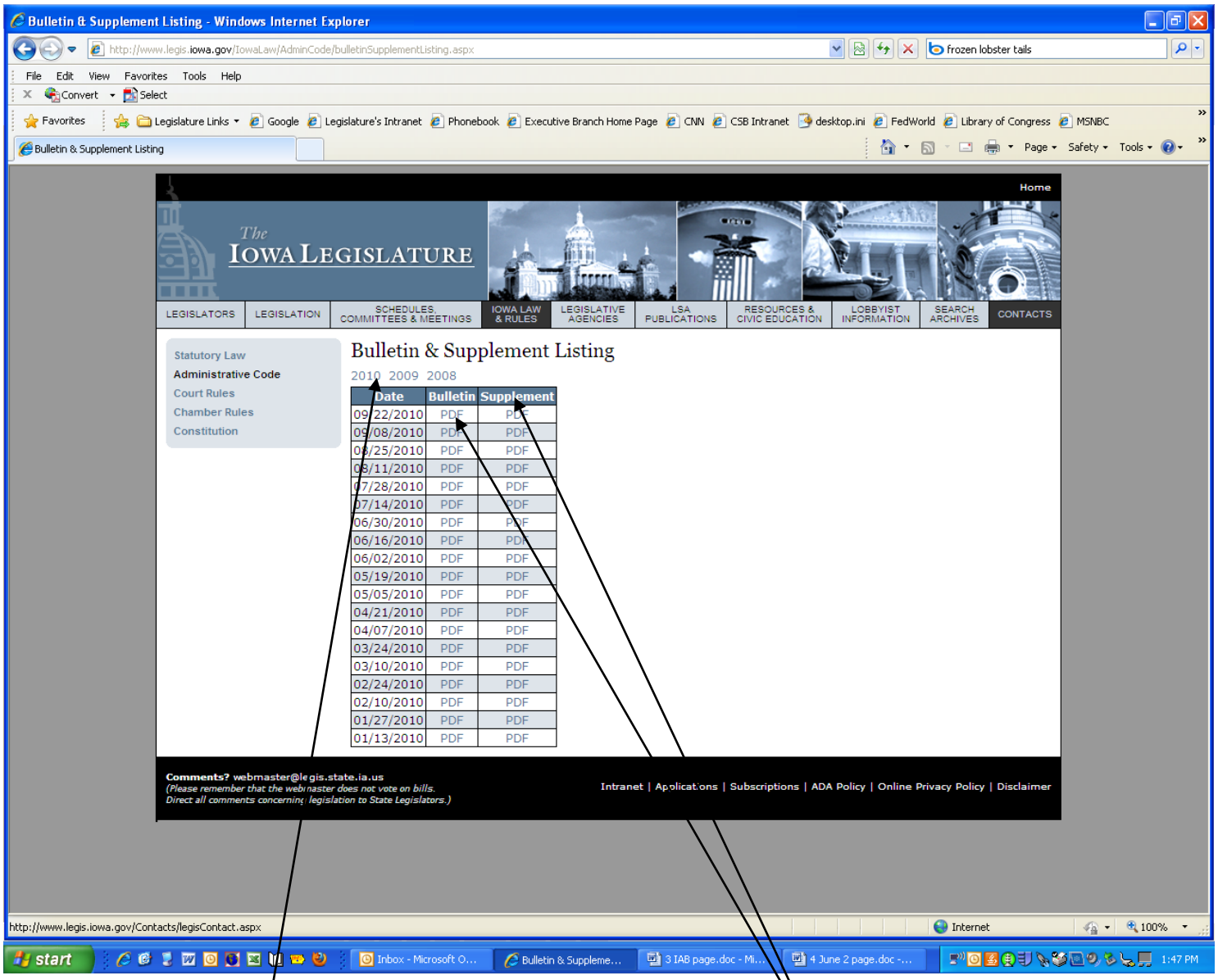


IOWA ADMINISTRATIVE BULLETIN

IOWA ADMINISTRATIVE CODE

IAB LIST

http://www.legis.iowa.gov/IowaLaw/AdminCode/bulletinSupplementListing.aspx

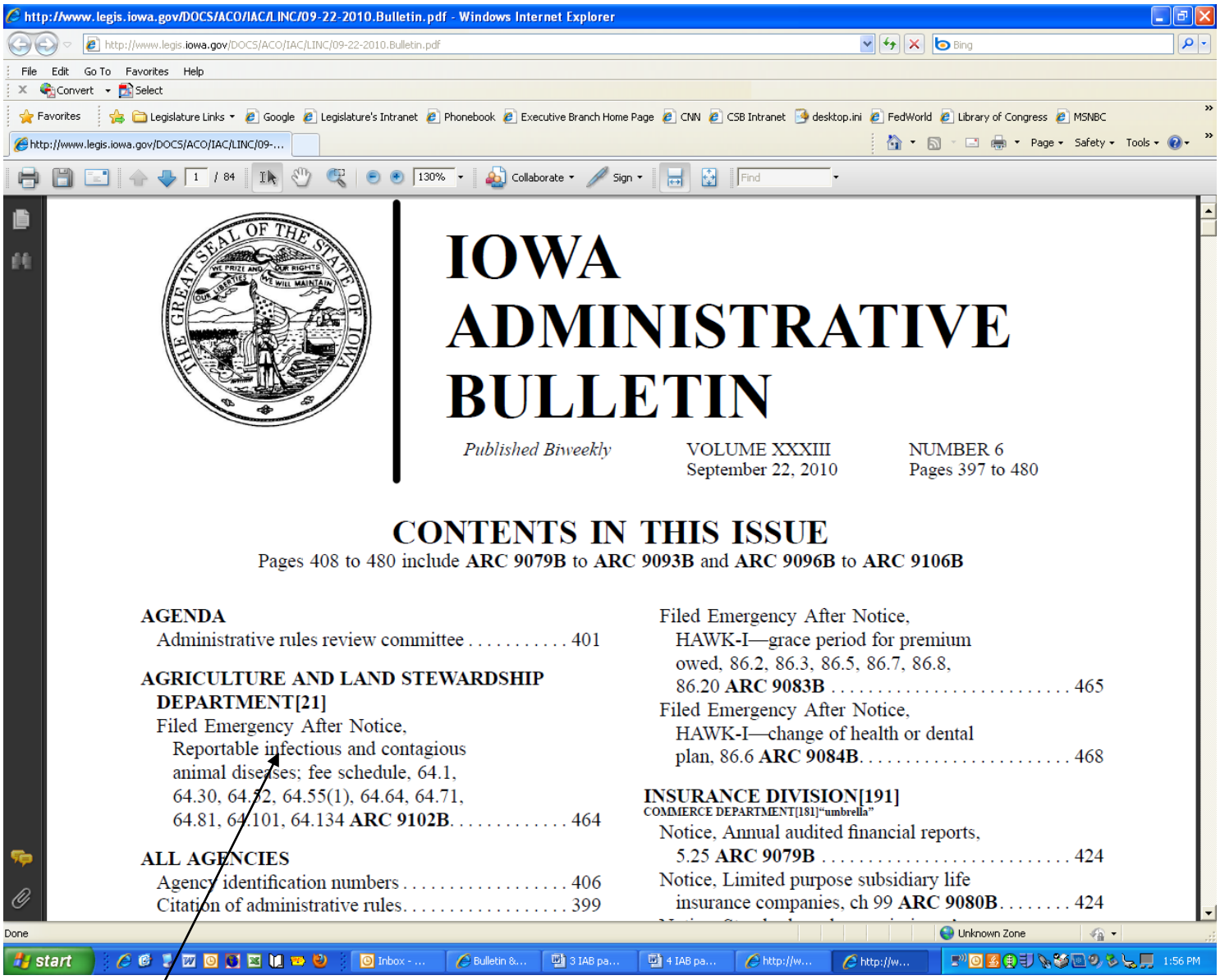


ARCHIVE

BULLETIN OR IAC SUPPLEMENT

IAB PAGE- 9-22-10

http://www.legis.iowa.gov/DOCS/ACO/IAC/LINC/09-22-2010.Bulletin.pdf



http://www.legis.iowa.gov/DOCS/ACO/IAC/LINC/09-22-2010.Bulletin.pdf - Windows Internet Explorer

IOWA ADMINISTRATIVE BULLETIN

Published Biweekly VOLUME XXXIII September 22, 2010 NUMBER 6 Pages 397 to 480

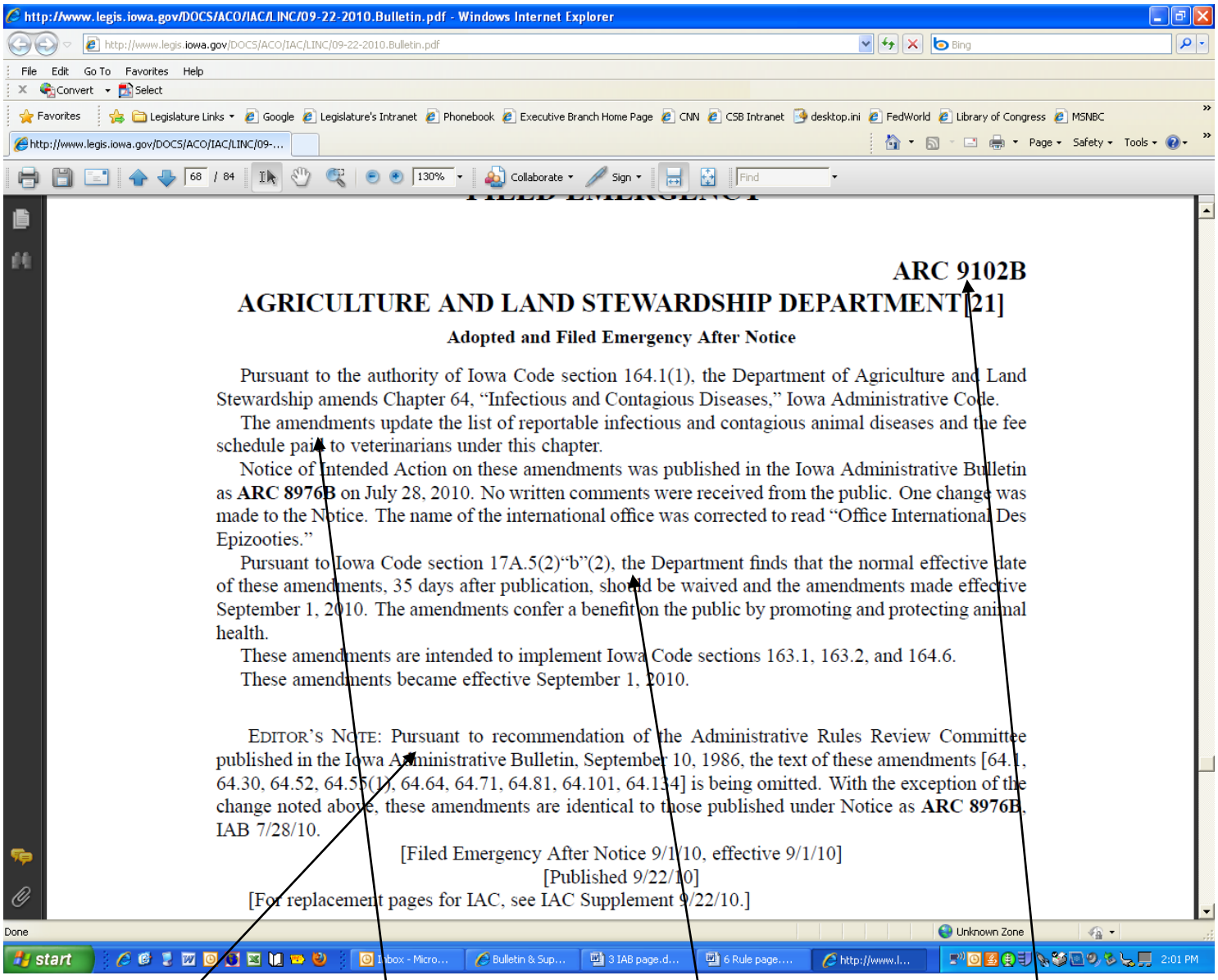
CONTENTS IN THIS ISSUE

Pages 408 to 480 include **ARC 9079B** to **ARC 9093B** and **ARC 9096B** to **ARC 9106B**

RULE CHANGE

9-22-10 IAB PAGE

http://www.legis.iowa.gov/DOCS/ACO/IAC/LINC/09-22-2010.Bulletin.pdf



ARC 9102B

AGRICULTURE AND LAND STEWARDSHIP DEPARTMENT[21]

Adopted and Filed Emergency After Notice

Pursuant to the authority of Iowa Code section 164.1(1), the Department of Agriculture and Land Stewardship amends Chapter 64, "Infectious and Contagious Diseases," Iowa Administrative Code.

The amendments update the list of reportable infectious and contagious animal diseases and the fee schedule paid to veterinarians under this chapter.

Notice of Intended Action on these amendments was published in the Iowa Administrative Bulletin as **ARC 8976B** on July 28, 2010. No written comments were received from the public. One change was made to the Notice. The name of the international office was corrected to read "Office International Des Epizooties."

Pursuant to Iowa Code section 17A.5(2)"b"(2), the Department finds that the normal effective date of these amendments, 35 days after publication, should be waived and the amendments made effective September 1, 2010. The amendments confer a benefit on the public by promoting and protecting animal health.

These amendments are intended to implement Iowa Code sections 163.1, 163.2, and 164.6.

These amendments became effective September 1, 2010.

EDITOR'S NOTE: Pursuant to recommendation of the Administrative Rules Review Committee published in the Iowa Administrative Bulletin, September 10, 1986, the text of these amendments [64.1, 64.30, 64.52, 64.55(1), 64.64, 64.71, 64.81, 64.101, 64.134] is being omitted. With the exception of the change noted above, these amendments are identical to those published under Notice as **ARC 8976B**, IAB 7/28/10.

[Filed Emergency After Notice 9/1/10, effective 9/1/10]
[Published 9/22/10]
[For replacement pages for IAC, see IAC Supplement 9/22/10.]

Text is omitted

HEADNOTE
Explanation of proposal

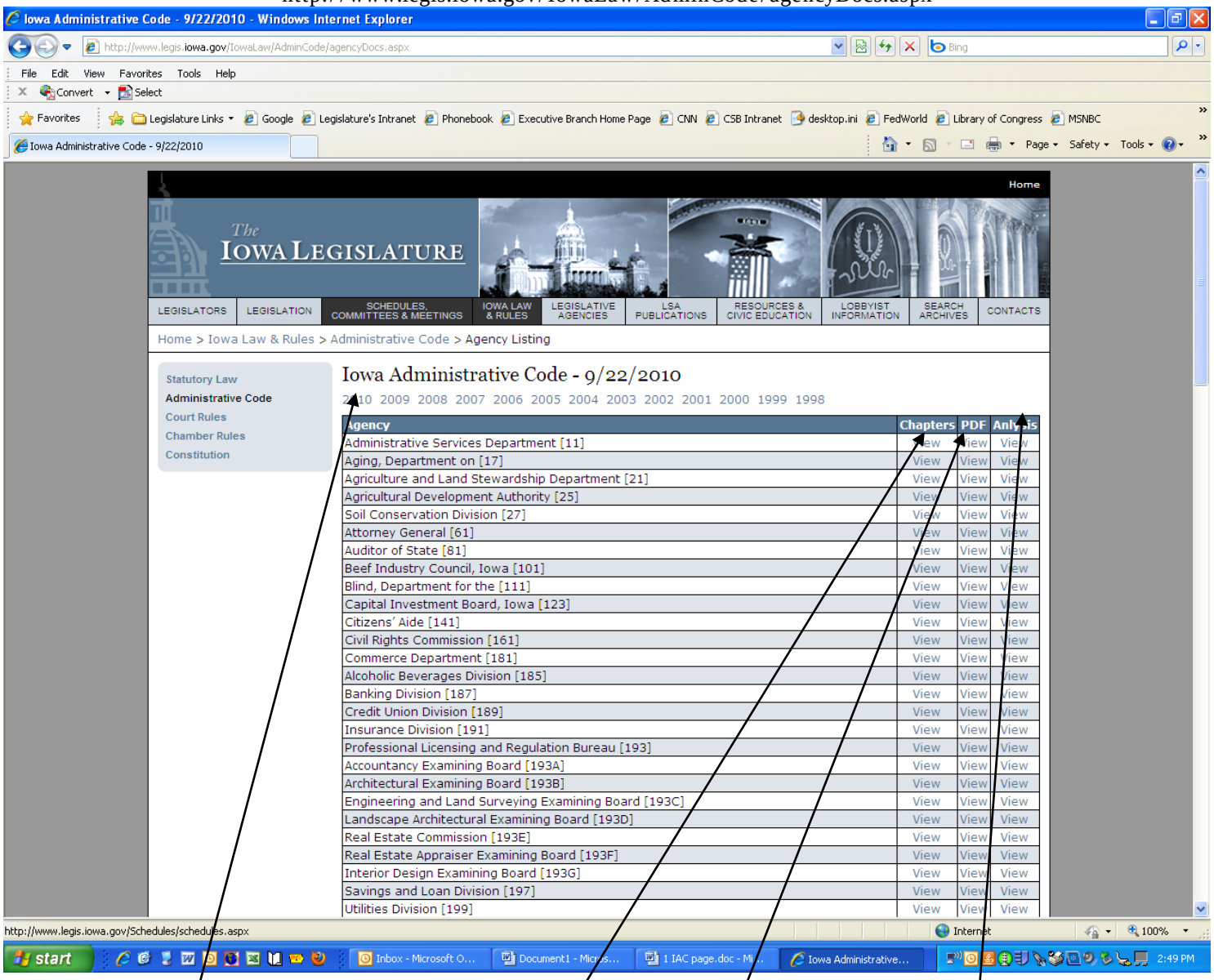
FILED EMERGENCY

ARC NUMBER
Identification number for all filings

Appendix "D"-the Iowa Administrative Code

IAC PAGE

http://www.legis.iowa.gov/IowaLaw/AdminCode/agencyDocs.aspx



ARCHIVED VERSIONS

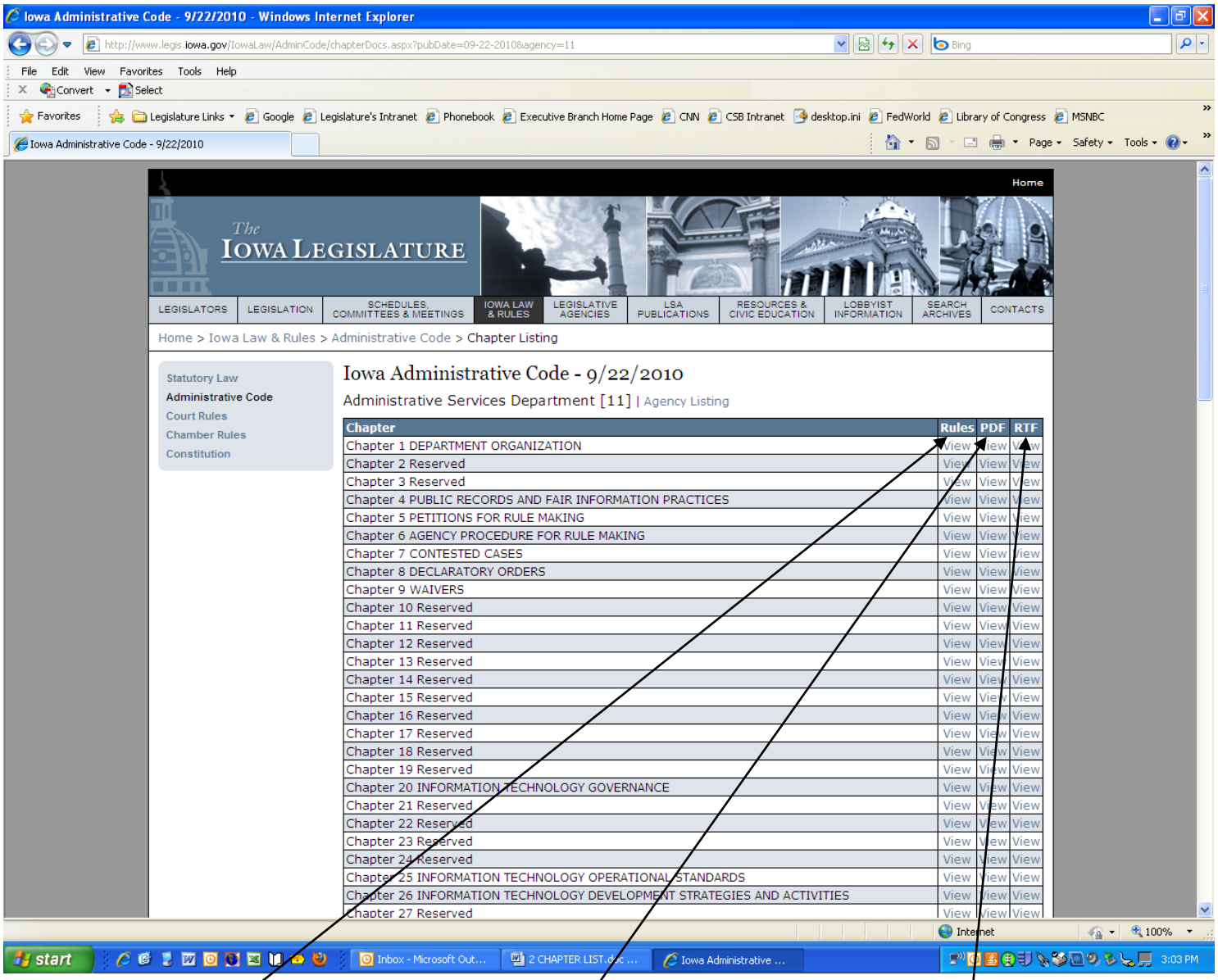
ALL RULES

INDIVIDUAL CHAPTERS

RULE INDEX

AGENCY CHAPTER PAGE

http://www.legis.iowa.gov/IowaLaw/AdminCode/chapterDocs.aspx?pubDate=09-22-2010&agency=11



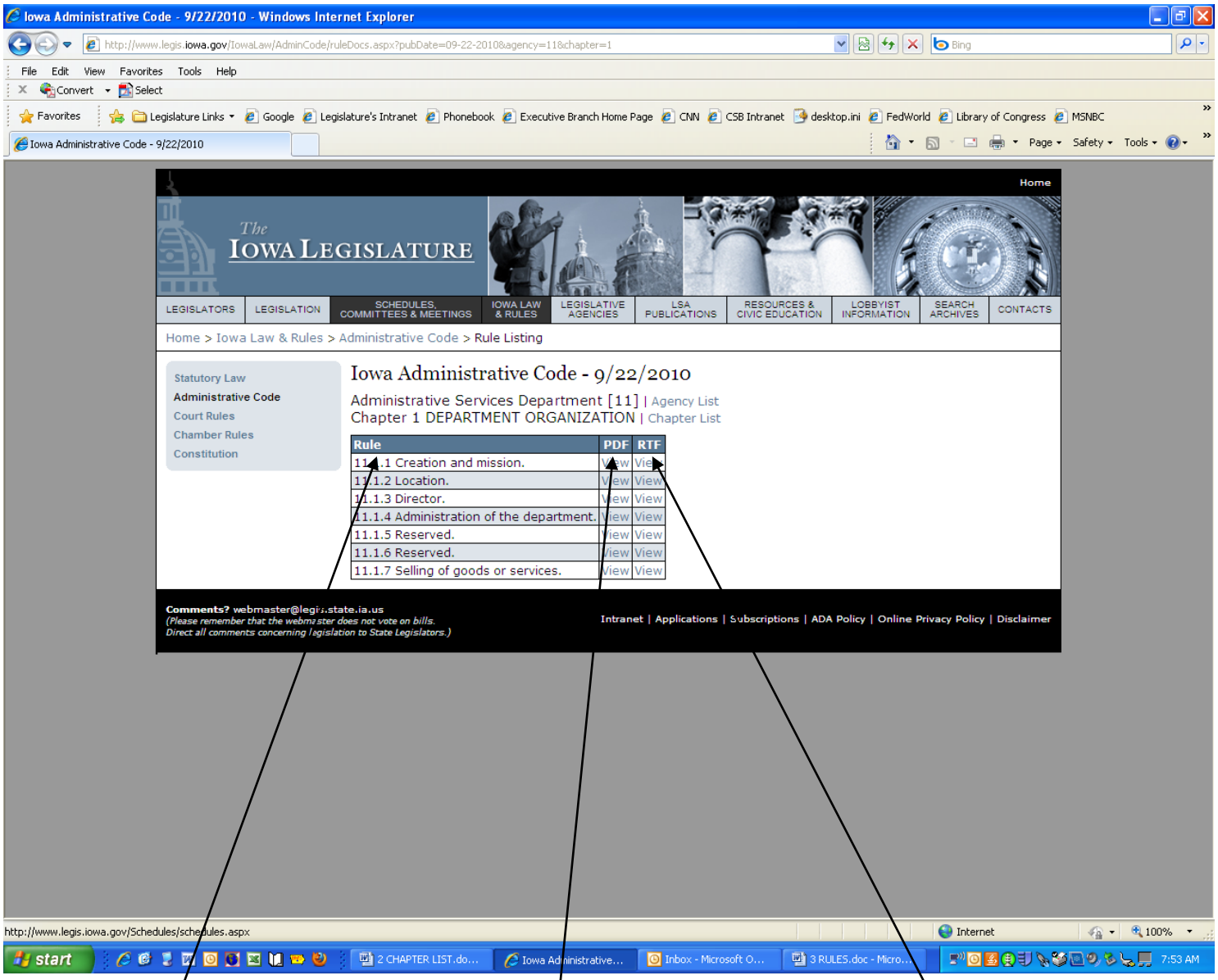
INDIVIDUAL RULES

ENTIRE CHAPTER
PDF Format

ENTIRE CHAPTER
RTF Format

RULE PAGE

http://www.legis.iowa.gov/IowaLaw/AdminCode/ruleDocs.aspx?pubDate=09-22-2010&agency=11&chapter=1



INDIVIDUAL RULES

RULE
PDF Format

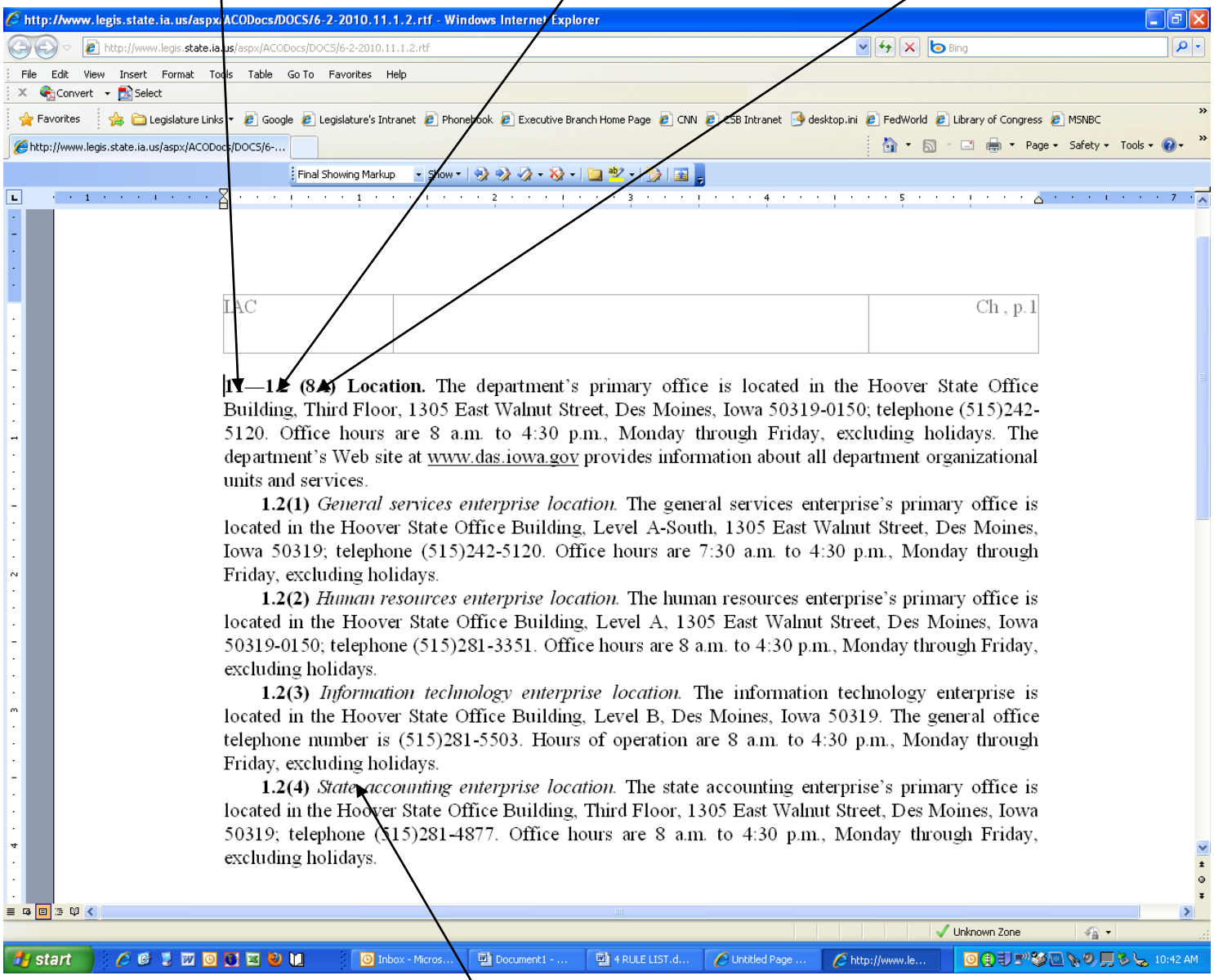
RULE
RTF Format

ANATOMY OF A RULE

AGENCY NUMBER

RULE NUMBER

STATUTE CITATION



SUBRULE